Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

ERNEST A. JANIK, JR., individually, on behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik; LEAH EILEEN JANIK, individually, on behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik,

Petitioners,

v.

CITY OF DALLAS, TEXAS,
an incorporated municipality,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit's continued application of its "bright line rule" in *Friends of the Earth v. Crown Central Petroleum Corp.*, 95 F.3d 358 (5th Cir. 1996), — notwithstanding this Court's **Article III** standing doctrine settled in *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 120 S.Ct. 693, 704, 707-708 (2000), — can justify dismissal of a **Clean Water Act** citizen suit for past and continuing **NPDES permit** violations.

2. Whether a district court's factual detail requirements for a **Resource Conservation & Recovery Act** ("RCRA") citizen suit pleading in the alternative, — notwithstanding this Court's "notice pleading" doctrine settled in *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 103 (1957), — and notwithstanding a pending **Rule 15(d)** motion to more definitely state the RCRA citizen suit's critical facts (involving disposed chemicals defined by the E.P.A. in **40 CFR Pt. 122** as "hazardous substances"), — may be dismissed as if a RCRA-based claim had not been pled.

3. Whether a nonmovant's **Rule 56(e)** evidence, including expert and fact witness declarations, may be deemed "undesignated" (and thus be ignored without meaningful Rule 56 evaluation), when the nonmovant's Rule 56(e) initial objection omitted pagination cites to such Rule 56(e) declarations, — notwithstanding this Court's substance-over-form norm settled in *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553 (1986), — even though immediately cured by nonmovant.

4. Whether a district court's **Rule 56** rulings in a **Clean Water Act/R.C.R.A.** citizen suit can avoid applying **Article VI's Supremacy Clause** to preëmptively limit state "governmental immunity" claimed by a city regarding its acts or omissions that violate federal environmental statutes, — notwithstanding this Court's federalism doctrine and preëmption ruling settled in *Sanitary District of Chicago v. U.S.*, 266 U.S. 405, 425-426, 45 S.Ct. 176, 178 (1924).

PARTIES TO THE PROCEEDINGS

Although this litigation has involved the City of Dallas and a variety of insurance defendants, **the City of Dallas, Texas, is the only defendant, petitioners believe, having an interest in this Petition for Writ of Certiorari.**

The petitioners herein are the plaintiffs below, **Ernest A. Janik, Jr. and Leah Eileen Janik, individually and on behalf of their minor sons, Grant Joseph Janik and Tyler Newman Janik.**

The defendants at the trial court level were seven: the **City of Dallas, Texas,** an incorporated municipality, plus the following six "insurance defendants" (whose d/b/a's are omitted as irrelevant to this appeal): **Amica Mutual Insurance Company,** a Rhode Island company, **Nobel Service Corporation,** a Delaware corporation, **IAS Claim Services, Inc.,** a Delaware corporation, **Nobel Holdings, Inc.,** a Delaware corporation (dismissed by summary judgment prior to trial), **Insurance Adjustment Services of Texas, Inc.,** a Texas corporation (dismissed by agreement as defunct), and **Floyd Myers** (dismissed by agreement before trial).

Of the seven trial court level defendants, only the following four were parties at the circuit court of appeals level: the **City of Dallas, Texas, Amica Mutual Insurance Company, Nobel Service Corporation,** and **IAS Claim Services, Inc.**

At the circuit court of appeals level there was one appeal that involved the **City of Dallas, Texas,** namely, 5th Circuit Appeal No. **98-10781,** which followed a summary judgment favoring that city.

A trial was had on some of the Janiks' claims against three of the insurance defendants. An appeal that did not include the City of Dallas as a party (but which arose from the same civil action) followed said trial, namely, 5th Circuit Appeal No. **98-11369.**

The 5th Circuit administratively consolidated both of these two appeals and simultaneously denied both appeals by an order of **July 6, 2000.** This denial (which affirmed the district court's summary judgment for the city, *and* affirmed the district court's post-trial JNOV for the insurance defendants) was the subject of the Janiks' petition for a panel rehearing, which petition was denied by the panel's order of **August 3, 2000**.

In this Petition for Writ of Certiorari the Janiks are not seeking review of the insurance-related rulings (i.e., the Janiks are not herein seeking review of 5th Circuit Appeal No. **98-11369**); rather, the Janiks are herein seeking review only of the City of Dallas-related summary judgment and its component interlocutory rulings (i.e., the Janiks seek review of the affirmance in 5th Circuit Appeal No. **98-10781**).

Thus, the only real parties of interest in this proceeding, petitioners believe, are the above-named family of plaintiffs ("Janiks") and the City of Dallas, Texas, a municipality ("city").

As a matter of informational completeness, there remains yet another appeal now pending in the Fifth Circuit that involves the insurance "half" of this litigation; — that appeal is 5th Circuit Appeal No. 99-11385, but that pending appeal (which involves Rule 59 and Rule 60 motions) does not involve the City of Dallas as a party and is not legally relevant to any of the four legal questions presented in this Petition for Writ of Certiorari.

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JURISDICTION

Petitioners' timely appeal in the court of appeals below was denied by an order entered July 6, 2000 (see Appendix Part "A"). A timely petition for panel rehearing was thereafter denied by the court of appeals by an order entered August 3, 2000 (see Appendix Part "A"). This Court's jurisdiction is now invoked under 28 U.S.C. § 1254(1).

STATUTES & OTHER FEDERAL LAWS INVOLVED

The statutes & other federal laws involved are: the U.S. Constitution, Article III's Section 2 and Article VI's Supremacy Clause; Clean Water Act statutes; Resource Conservation & Recovery Act statutes; portions of the E.P.A.-issued NPDES Permit for City of Dallas; and Federal Rules of Civil Procedure, Rule 15(d) and Rule 56. The text of these statutes and other federal laws are set forth in the **Appendix's Part "B"**.

STATEMENT OF THE CASE

Procedural History. **The final judgment below blended a few interlocutory partial summary judgments (Clean Water Act, etc.) with a judgment on the pleadings (RCRA claim).**

In 1993 untreated sewage wastewater harmed the Janiks, personally, and their property. In 1995 the Janiks sued the City of Dallas and various insurance entities on claims relating to the Janiks' personal injuries and property damages, combined with a Clean Water Act citizen's suit. After some discovery, cross motions for summary judgment were filed. Interlocutory partial summary judgments were granted to the City of Dallas, then vacated, revised, then quasi-reinstated. The trial court entered **Judgment** on May 28, 1998 (**Doc #352**) as to claims against the City. That Judgment relied upon prior memorandum opinions and orders ("rulings") entered below, i.e., rulings entered 10-15-1997 (**Doc #238**), 11-20-1997 (**Doc #301**), 4-17(20?)-1998 (**Doc #342**), 5-13-1998 (**Doc #343**), and 5-26-1998 (**Doc #350**). The Fifth Circuit panel affirmed and denied a rehearing.

Statement of Relevant Facts. On 10-31-1993 untreated sewage wastewaters of the City of Dallas were discharged in a manner not authorized by the city's EPA-issued Clean Water Act/ NPDES permit ("polluter's permit"), with most of the untreated sewage wastewater invading the home of the Janiks prior to its draining into the Trinity River. This physical invasion of the Janiks property by ten-thousands of gallons of untreated municipal sewage waters, and the biohazardous contaminants therefrom, substantially and illegally interfered with the Janiks' use and enjoyment of their home and related personal property items, and sickened them. **Doc #85 at 3-19; Doc #318 at 8-11; Doc #140 at 1-5.**

This unauthorized pollution discharge produced ongoing harm to the Janiks' health, safety, and property during 1993 (and after), and revealed unauthorized conditions and practice of the

City of Dallas, as to similar biohazardous contaminations, that continue to jeopardize the health, safety, and property of the community at large, due to the past and current problems with Dallas' sanitary sewer system. **Doc #331 at 1-5; Doc #332 at 3.**

The Rule 56 evidence shows that the city did not attempt to fulfill its Clean Water Act polluter's permit-mandated duties (to preventively protect against, report, and remedially mitigate the human health-jeopardizing adverse impacts and threats of its unpermitted discharge of pollutants) to the Dallasites involved.

This unfixed and unmitigated situation has harmed U.S. waters in the tributary network of the Trinity River, since the city's unpermitted discharge of untreated sewage wastewater routinely contains at least 21 hazardous substances, in addition to raw fecal coliforms, and thus the environment is still at substantial risk.[1] **Doc #318 at 11-18.** Continuing risks of recurrences to Dallasites (including the Janiks) are still imminent, according to expert declarants Brandon (M.D.), Egbert (P.E.), and McElyea (P.E.). Continuing risk of such recurrences involve substantial endangerment to all Dallasites who (even to date) are serviced by Dallas Water Utilities; so potential for repeat of such injuries and damaged property remains. *See* **Doc #188 at 11-38, 59-63, 75-82; Doc #119 at 1-5H; Doc #82's Exhibit "B"; Doc #118 at 1-3; Doc #115 at 2-3; Doc #318 at 11-18; Doc #122 at 1-4;**

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[1] **Doc #318** is Dr. Brandon's DECLARATION WITH EXPERT OPINIONS RELEVANT TO SEWAGE-BORNE HAZARDOUS WASTES (filed 1-5-1997), a copy of which was attached as Exhibit "B" to **Doc # 326** (plaintiffs' Objection filed 1-7-1998), which identifies and discusses (at the declaration's pages 14-18) ***21 EPA-defined "hazardous wastes" reported to the EPA as being found in the City of Dallas' untreated sewage influent:*** acetaldehyde, allyl alcohol, aniline, benzyl chloride, carbaryl, carbofuran, carbon disulfide, cresol, cyclohexane, dimethyl amine, disulfoton, ethylene dibromide, formaldehyde, furfural, methoxychlor, methyl methacrylate, parathion, phosgene, resorcinol, strychnine, and triethylamine. *Regarding plaintiffs' good faith assertion of a Clean Water Act citizen suit, see* **Doc #148 at 1-5.**

Doc #130 at 3-37; Doc #85 at 3-19, 40-41; Doc #331 at 1-5; Doc #332 at 3.

REASONS FOR GRANTING THE PETITION

1. Article III Standing Issue for Clean Water Act Case.

This Court should grant a reversal, to correct the Fifth Circuit's continued application of its "bright line rule" in *Friends of the Earth v. Crown Central Petroleum Corp.*, 95 F.3d 358 (5th Cir. 1996), which conflicts with Court's **Article III** standing doctrine settled in *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 120 S.Ct. 693, 704, 707-708 (2000).

Otherwise, the Fifth Circuit will continue to affirm district court dismissals of **Clean Water Act** citizen suits, for past and continuing **NPDES permit** violations, in cases where plaintiffs have Article III injuries-in-fact that satisfy *Laidlaw* but do not satisfy the Fifth Circuit's narrower gatekeeping in *Crown Central.*

In more particularized summary, this first federal question is whether the Fifth Circuit's continued reliance upon the "bright line rule" in *Friends of the Earth v. Crown Central Petroleum Corp.*, 95 F.3d 358, 360-361 (5th Cir. 1996), — notwithstanding this Court's **Article III** ruling in *Friends of the Earth v. Laidlaw Env'l Services (TOC), Inc.*, 120 S.Ct. 693, 704, 707-708 (2000), — improperly deprived petitioners of their right to seek citizen suit relief under Section 505 of the **Clean Water Act** (33 U.S.C. § 1365), for their own past and continuing injuries caused by a city's **NPDES** permit violations, namely, both actualized and threatened injury to petitioners' human health and private property, and also to the environment, including continuing risks of injury to the tributary network of a navigable river.

This Article III question involves a "split" in the circuit courts of appeals on Article III standing, an important federal question.

(See Supreme Court Rule 10(a), regarding "conflicts" in the circuit courts of appeals.)

The Fifth Circuit continues, despite *Laidlaw*, to deny Article III standing recognition to Clean Water Act citizen suitors who do not fit its rigid and exclusive three-part formula set forth in *Friends of the Earth v. Crown Central Petroleum Corp.*, 95 F.3d 358, 360-361 (5th Cir. 1996) (*"Crown Central"*), — a test which the Third Circuit calls a "bright line rule":

> In a case similar to the one before us, the Fifth Circuit held that "an individual without standing to sue for discharge violations, a fortiori, lacks standing to sue for reporting violations." *Friends of the Earth, Inc. v. Crown Central Petroleum Corp.*, 95 F.3d 358, 362 (5th Cir. 1996) (affirming lower court's dismissal of emissions claims and monitoring and reporting claims). **Because we think that it is at least possible that some plaintiff in the future might allege a specific and concrete injury arising from a defendants' failure to monitor and report its effluent discharges, we will not adopt the Fifth Circuit's [Crown Central] bright line rule.**

Quoting *PIRG of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 124 (3rd Cir. 1997) (emphasis added). In effect, the Janiks' case would not have been dismissed on Article III standing grounds if its had been brought in a court that followed the Third Circuit's view of Article III, as opposed to the Fifth Circuit's view of Article III:

> For example, a [Clean Water Act citizen suit] plaintiff might have reason to fear the toxicity of fish in a river due to a defendant's past pollution of that river, which had resulted in injury to others. Were the defendant to then fail to monitor and report its effluent, the plaintiff might reasonably decide to forego eating fish from the river. Such a result might

> constitute the type of injury in fact necessary to support the plaintiff's [Article III] standing to sue.

Quoting *PIRG of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 124 at footnote 9 (3rd Cir. 1997).

The "split" between the Fifth and Fourth Circuits, on this Article III gatekeeping question, has been observed and discussed by a district court within the Eighth Circuit:

> The Third Circuit recently addressed this precise issue, noting the apparent split in the Circuits. *Public Interest Research Group v. Magnesium Elektron, Inc.*, 123 F.3d 111 (3d Cir.1997). In *[Sierra Club v.]* Simkins Indus., [847 F.3d 1109 (4th Cir. 1988),] only monitoring and reporting violations were alleged; nevertheless, the Fourth Circuit did find that the plaintiff had standing because such violations hindered environmental policy-makers "who might undertake to remedy the effects of any pollution." 847 F.3d at 1113. . . . The Fifth Circuit, on the other hand, has adopted a bright line rule that "'an individual without standing to sue for discharge violations, a fortiori, lacks standing to sue for reporting violations,'" *Id.* (quoting *Friends of the Earth, Inc. v. Crown Central Petroleum*, 95 F.3d 358, 362 (5th Cir. 1996)). The Third Circuit decided not to adopt this bright line rule, reasoning that "it is at least possible that some plaintiff in the future might allege a specific and concrete injury arising from a defendant's failure to monitor and report tis effluent discharges . . ." *Id.* . . .
>
> Neither the United States Court of Appeals for the Eighth Circuit nor apparently any District Court in the Eighth Circuit has been called upon to decide a question similar to that presented here. This Court finds the rule developed by the Fourth Circuit [in *Simkins Indus.*] to be the proper rule and holds that plaintiff does have standing to pursue its claims against the City for the alleged ongoing violations of

> the terms and conditions of the NPDES permits. As explained in *Simkins Indus.*, because the definition of an "effluent standard or limitation" under 33 U.S.C. § 1365(f)(6) includes ***"a permit or condition thereof*** issued under § 1342," a violation of permit conditions is a violation of the effluent standard or limitation. 847 F.2d at 1117. ... Moreover, "[u]nless a permit holder monitors as required by the permit, it will be impossible for state and federal officials charged with enforcement of the Clean Water Act to know whether or not the permit holder is discharging effluents in excess of the permit's maximum levels." *Id.*

Quoting from *Patterson Farm, Inc. v. City of Britton, S.D.*, 22 F.Supp.2d 1085 1093 (D.S.D. 1998).

Furthermore, the Fourth Circuit's approach to Clean Water Act citizen suit standing qualifications — in contrast to the "bright line rule" of the Fifth Circuit's *Crown Central* holding — can be seen in *Friends of the Earth v. Gaston Copper Recycling*, 204 F.3d 149 (4th Cir. 2000), *en banc reversing* 179 F.3d 107 (4th Cir. 1999):

> Standing inquiry in environmental cases, for example, must reflect the context in which the suit is brought. In some instances, environmental injury can be demarcated as a traditional trespass on property or tortious injury to a person. In other cases, the damage is to an individual's aesthetic or recreational interests. The Supreme Court has made it clear that such interests may be vindicated in the federal courts. *see, e.g., Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, ... 120 S.Ct. 693, 705 ...

Quoting 204 F.3d at 154. Thus, economic and non-economic injuries may be asserted by Clean Water Act citizen suit plaintiffs, if they are "among the injured" — so that the suitor is a truly

interested stakeholder in the litigation's eventual outcome. Id. If so, Clean Water Act's citizen suit gates should be opened:

> In addition to meeting the "irreducible" constitutional minimum, *Lujan v. Defenders of Wildlife*, ... an individual must also satisfy any statutory requirements for standing before bringing suit. As noted earlier, the citizen suit provision of the Clean Water Act confers standing on any "person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). The language chosen by Congress confers standing on a "broad category or potential plaintiffs" who "can claim some sort of injury," be it actual or threatened, economic or noneconomic. *National Sea Clammers*, 453 U.S. at 16-17, 101 S.Ct. 2615. The Supreme Court recognized in *National Sea Clammers* that this [statutory] grant of standing reaches the outer limits of Article III. *Id.* at 16, 101 S.Ct. 2615 ("It is clear from the Senate Conference Report that this phrase was intended by Congress to allow suits by all persons possessing standing under this Court's decision in *Sierra Club v. Morton*.") Thus, if a Clean Water Act plaintiff meets the constitutional requirements for standing, then he *ipso facto* satisfies the statutory threshold as well.

Quoting *Gaston Copper Recycling*, 204 F.3d at 155.

Besides a "split" in the federal circuits, this Article III question involves a deviation from the U.S. Supreme Court's most recent precedent, by a circuit court of appeals, on Article III standing, an important federal question. (*See Supreme Court Rule 10(c), on conflicts by circuit courts of appeals with federal law "settled" by this Court.*) The Fifth Circuit continues, despite *Laidlaw*, to deny Article III standing recognition to Clean Water Act citizen suitors who do not fit its rigid and exclusive three-part formula set forth in *Friends of the Earth v. Crown Central Petroleum Corp.*, 95 F.3d 358, 360-361 (5th Cir. 1996) (*"Crown Central"*), — a test which this Court has very recently "settled" by indicating

that the quintessential Article III inquiry, in a Clean Water Act citizen suit, is a continuing "injury to the plaintiff," as opposed to a continuing "injury to the environment":

> The relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff.

Laidlaw, 120 S.Ct. at 704.

On example of a *Laidlaw* plaintiff, who claimed an injury-in-fact due to NPDES violations, was Gail Lee:

> Gail Lee attested that her home, which was near Laidlaw's facility, had a lower value than similar homes located further from the facility, and that she believed the pollutant discharges accounted for some of the discrepancy.

Id. at 705.

In effect, the trial court below used a 1996 Fifth Circuit case for an Article III "standing" application that now conflicts with this Court's holding in *Laidlaw*, yet the Fifth Circuit panel below, — despite specific citation to this conflict ***(see Janiks' Petition for Panel Rehearing, pages 2-6)***, — did not vacate its discussion-less reliance on that ruling, such that the Fifth Circuit panel below continued its conflict with this Court's *Laidlaw* ruling.

Why? In the proceedings below, the trial court grounded (and limited) its disposal of the Clean Water Act claim on its own application of the *Friends of the Earth v. Crown Cent. Petrol. Corp.*, 95 F.3d 358 (5th 1996), by saying:

> To establish constitutional standing, plaintiffs must show (1) actual or threatened injury, (2) fairly traceable to the City's actions, and (3) that the injury will likely be redressed if they prevail in the lawsuit. ***Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.***, 95 F.3d 358, 360 (5th Cir. 1996) ...

> The court need only address the second element because the plaintiffs have failed to meet the requirement that the injury be "fully traceable" to any City violation. To establish that their injury is "fairly traceable" to the City's discharge, *plaintiffs must establish that the* City "has (1) discharged some pollutant in concentrations greater that allowed by its permit (2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that (3) the pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs." ***Friends of the Earth*** *[v. Crown Central]*, 95 F.3d at 360-61. ... Plaintiffs have failed to adduce any evidence that they have an interest in the Trinity River, which is the relevant waterway in this case. Nowhere in their motion or response do plaintiffs identify their specific interest in the Trinity River. Plaintiffs have therefore failed to raise a genuine issue of material fact on this issue and to prove this element. The court holds that plaintiffs lack standing to assert a discharge violation under the Clean Water Act.

Order of 4-16-1998 (**Doc #342**), pages 2-3 and 4-5. The Fifth Circuit panel below effectively adopted *Crown Central's* "river interest" condition/position without any appellate opinion discussion, thus effectively applying the "river interest" test to the Janiks. *But discussion is needed!* The "stakeholder" approach to nuisance "standing" analysis has just been ratified once again, by this Court in *Laidlaw* 120 S.Ct. at 707-708 (7-to-2 holding in a Clean Water Act/NPDES permit-related case decided on Article III "standing" question).

Thus, a "river interest" condition is not *per se* required by Article III's "standing" doctrine, because *it is the injury to the plaintiffs, and* ***not*** *to the river, that is critical:*

> The relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff. To insist upon the former rather than the latter as

> part of the standing inquiry (as the dissent in essence does, *post*, at 713-714) is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with an NPDES permit. Focusing properly on injury to the plaintiff, the District Court found that *[the NPDES permit violations-alleging plaintiffs]* had demonstrated sufficient injury to establish standing. ...

Laidlaw, 120 S.Ct. at 704. Thus, the authoritative standard for screening "standing" in a Clean Water Act-based/NPDES permit violations case is whether the plaintiffs were injured by NPDES permit violations (and *not* whether proof of plaintiffs' injuries must be yoked to proof of an "environmental injury" to a particular river wherein they have a special "interest"). *Laidlaw*, 120 S.Ct. at 705 (illustrating how plaintiff Gail Lee's pollutant discharge-affected economic interests can satisfy Article III standing in a Clean Water Act/NPDES permit violation context).

The Janiks did submit competent summary judgment evidence, as a nonmovant, showing that each of the three *Laidlaw* standing elements would be provable at trial, i.e., that:

(1) the Janiks suffered an "injury in fact" that was/is (a) concrete and particularized and (b) actual or imminent;

(2) the Janiks' injuries were/are "fairly traceable" to the challenged conduct of the defendant; and

(3) it is likely, as opposed to merely speculative, that the injury will be "redressed" by a favorable decision.[2]

First, the Janiks showed they could present evidence at trial that they suffered "injuries in fact." **Doc #85** (esp. pp. 3-7, 40, describing sicknesses and property damage due to city sewage flooding contaminations); **Doc #140**(esp. pp. 1-5); **Doc #140**

[2] See *Laidlaw Env'l*, 120 S.Ct. at 704, *following Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130 (1992).

(pp. 1-5, providing medical data and diagnoses of Janik sickness as caused by untreated sewage flooding and sewage-produced bioaerosol exposures); **RECORD EXCERPTS Tab M** (pages 6, 40) **and Tab N** (page 3); **98-10781 Opening Brief** (pp. 3-4).

Second, the Janiks showed they could present evidence at trial that their injuries were "fairly traceable" to the City's strict liability violations of its EPA-issued NPDES permit, e.g., allowing an "overflow not specifically authorized" in the City's NPDES permit (violating **Part II's page 17, § E**); failing to "take all reasonable steps to minimize or prevent any discharge in violation" of its NPDES permit that "has a reasonable likelihood of adversely affecting human health or the environment" (violating **Part III's § B's ¶2**). See **Doc #331** (pp. 1-5, sewer system not fixed yet); **Doc #188** (pp. 27-35); **Doc #122**(p. 3, ¶12); **Doc #140** (pp. 1-5, providing medical diagnoses of Janik sickness as **caused** by sewage flooding and related sewage-bioaerosol exposures); **Doc #318** (pp. 1-14, esp. p. 10, providing medical diagnoses of Janik illnesses as being **caused** by sewage flooding and sewage-bioaerosol exposures); **Record Excerpts Tab M** (pp. 12-13) **and Tab O** (pp. 7-8); **Opening Brief** (pp. 8-20).

Third, the Janiks showed they could present evidence at trial that the relief sought satisfies "redressability," because § 1365(d) relief may include injunctive relief, appointment of a master, and deterrence catalyzed by civil penalties.[3] **Doc #188** (pp. 30, 86); **Record Excerpts Tab P** (showing how the plaintiffs' proof of NPDES violations can satisfy Clean Water Act "public nuisance" goals while simultaneously proving "nuisance per se" as a yoked "private nuisance" claim, as discussed in the **Opening Brief**'s pages 8-16).

The trial court denied that the Janiks were sufficiently concerned "stakeholders" qualified to bring a citizen suit challenging the city's failure to fulfill its Clean Water Act-based NPDES

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[3] *Laidlaw Env'l*, 120 S.Ct. at 706.

polluter's permit-mandated duties to *preventively* protect against, to *report*, and to *remedially mitigate* the human health-jeopardizing impacts and ongoing threats of unpermitted discharge of pollutants onto Dallasites and/or their private property.

In *Friends of the Earth, Inc. v. Crown Cent. Petrol. Corp.*, 95 F.3d 358 (5th Cir. 1996), — to the extent that any "standing" analysis in *Crown Central* survives *Laidlaw*, — an "extra" "standing" formula was used, but it only makes sense if applied to a citizen's suit primarily focusing on injury to "the environment," which is but one of the two Clean Water Act concerns, the other being "human health." But the standing question relevant to the Janiks' identity as "stakeholders" qualified to sue as citizens to enforce the Clean Water Act is whether their "special" human health-oriented injuries are "traceable" to the city's violations of its permitted right to discharge pollutants in accordance with the strict liability parameters of its EPA-issued NPDES permit. See 33 U.S.C. § 1365(g) (defining "citizen") and 33 U.S.C. § 1311(a) (defining "unlawful" noncompliance by cross-references, e.g., the NPDES section, § 1342), *in conjunction with* 33 U.S.C. § 1342 (defining the NPDES polluter's permit program) and 33 U.S.C. § 1365(f) (defining "effluent standard or limitation" to include NPDES permit and conditions thereof), and 33 U.S.C. § 1362(6) (defining "sewage" as a "pollutant"). *Accord*, **Doc #85 at 3-19.**

In the Janiks' case, the trial court erred by denying their Clean Water Act claim, based on "standing," as if only those asserting a "river interest" injury can be a stakeholder.[4] This misses the boat.

[4] As to Clean Water Act citizen suit "standing," please review the arguments, authorities, and Rule 56 evidence chart provided in *Plaintiffs' Motion to Reconsider the Partial Summary Judgment of 10-14-1997, With or Without . . . Page Number Citations* (filed 10-24-1997 as **Doc #241**), — esp. at its pages 2-3, and attached Exhibit A (pages A-1 through A-13), Exhibit B (pages 42-53, — about Clean Water Act "standing"), Exhibit D (Miller Declaration, last 3 pages),

The Janiks' suit is a modern-day equivalent of a "combined" public-and-private nuisance claim.

The Janiks suffer special injuries directly related to one of the twin concerns of the Clean Water Act and RCRA: *"human health"* and *"the environment"*). By missing this twofold key to the "public nuisance" side of the Clean Water Act's nature, the trial court has ignored and negated literally centuries of Anglo-American legal history. Historically *(for 460+ years!)*, nuisance claimant "stakeholder" status at common law has been recognized as satisfied — since the reign of King Henry VIII — by the public nuisance claimant's proof of a "special" (personalized) injury that is substantial and/or uniquely suffered, such that a "stakeholder"— claimant's injury credentials him to assert a claim to "abate" (remedy) the incurred, ongoing, and/or imminently threatened damages to the public's rights. See Prosser, Wade & Schwartz, Cases and Materials on Torts, 7th ed., "Nuisance," at 855, *citing as the seminal case*, Y.B. 27 Hen. VIII, Mich., pl. 10 (1536), and Prosser, *supra*, at 847-848, *citing* McRae, "Development of Nuisance in the Early Common Law," 1 U. Fla. L. Rev. 27 (1948), *and* Keeton, "Trespass, Nuisance and Strict Liability," 59 Colum. L. Rev. 457 (1959), and Restatement, 2nd Torts § 821C ("Public nuisance").

Because the "stakeholder" must have a "special" injury from the nuisance, it is not unusual for such a claimant to combine (or to "unite") his "private nuisance" and "public nuisance" claims into the same lawsuit. Prosser, Wade, & Schwartz, Torts (7th ed., 1982), "Nuisance," at 848. Texas case law accords with this time-honored tradition. *E.g., Ballenger v. Grand Saline*, 276 S.W.2d 847 (Tex. Civ. App. — Waco 1955); *Newton v. Highland Park*, 282 S.W.2d 266 (Tex. App. — Dallas 1955, writ ref'd, n.r.e.). In fact, the private claimant who can best assert a public

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Exhibit E (Janik Declaration, pages 1-2), Exhibit G (Levine Declaration, 3 pages), Exhibit M (McKasson Declaration, pages 1-3), Exhibit Q (Rule 56 List, pages 1-3), — with **Doc #85 at 3-19**.

nuisance-like action is the private citizen who himself or herself can simultaneously assert a private nuisance-like claim.

Since the Janiks have been Dallasites receiving City of Dallas sewer service via Dallas Water Utilities *[a stakeholder fact which Mr. Janik's Rule 56(e) declarations confirm]* — at all times during 1993 to date, — the Janiks are as much at risk of the city's unmitigated biohazardous risk-producing noncompliances, with the city's Clean Water Act/NPDES permit, as the Janiks were when those city noncompliances caused their disastrous personal injuries and personal property losses during 1993. If the Janiks have no Clean Water Act § 1365 "standing" to complain — about the city's ongoing failure to prevent untreated sewage wastewater overflows by fixing the defective sanitary sewer system, and about the city's ongoing failures to monitor and report their untreated sewage overflows, and about the city's ongoing failure to mitigate the harms causes by its "we're-unaccountable-so-we-don't-mitigate" practices, — then what Dallasites ever can?

How can the EPA adequately oversee Clean Water Act compliance if the city can evade NPDES permit compliance duties by non-reporting unlawful discharges, then assert state law "immunity" regarding citizen suits for permit violations?

1-C. The Fifth Circuit's failure to use legislative history.

In effect, the Fifth Circuit's "bright line rule" in *Crown Central* is defeating the very intent of Congress, whose intent must be judicially considered in Clean Water Act decisions. This is error. *Waste Action Project v. Dawn Mining Corp.*, 137 F.3d 1426, 1428-1429 (9th Cir. 1998), *following Train v. Colorado PIRG*, 426 U.S. 1, 9-11, 96 S.Ct. 1938, 1942-1943 (1976).

In fact, the Clean Water Act's own language, as well as its legislative history, indicate that Congress strove to protect both **"human health"** and **"the environment"**, and that this was to be accomplished in part by "public participation" in "enforce-

ment". *E.g.*, 33 U.S.C. **§ 1251(e)** ("Public participation in ... enforcement of any regulation, etc.: **Public participation in ... enforcement of any regulation, standard, effluent limitation, plan, or program established by the [EPA] Administrator ... under this chapter shall be** provided for, **encouraged**, and assisted by the [EPA] Administrator and the States ..." [*emphasis added*]); **§ 1311(g)(2)(C)** ("A modification under this subsection shall be granted only upon a showing ... [that] such modification will not result in a discharge of pollutants ... which may reasonably be anticipated to pose an unacceptable risk to **human health or the environment** ..." [*emphasis added*]); **§ 1342(k)** ("National Pollutant Discharge" Elimination System" ... "Compliance with permits: Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 ..., except any standard imposed under section 1317 of this title for a toxic pollutant injurious to **human health** ...[*emphasis added*]); **§ 1365** ("Citizen suits"); etc. *See, accord,* 1972 U.S. Code Cong. & Adm. News, p. 3668, re Pub.L. 92-500, esp. 3750-3751, 3825. *Cf. also* 1977 U.S. Code Cong. & Adm. News, p. 4326, re 1977 Pub.L. 95-217; 1981 U.S. Code Cong. & Adm. News, p. 2629, re Pub.L. 97-117.

Thus, the end-result of the Fifth Circuit's *Crown Central* "bright line rule" is to improperly quash opportunities for private attorneys general to have the greatest-possible access to federal courts, for Clean Water Act-based health-related citizen suits:

> The Supreme Court recognized in *National Sea Clammers* that this [statutory] grant of standing reaches the outer limits of Article III. *Id.* at 16, 101 S.Ct. 2615 ("It is clear from the Senate Conference Report that this phrase was intended by Congress to allow suits by all persons possessing standing under this Court's decision in *Sierra Club v. Morton.*") Thus, if a Clean Water Act plaintiff meets the constitutional requirements for standing, then he *ipso facto* satisfies the statutory threshold as well.

Quoting *Gaston Copper Recycling*, 204 F.3d at 155.

Accordingly, a citizen suit is proper if the plaintiff asserts within his or her complaint a good faith claim for an "injury in fact," personal to that plaintiff, that "flows" from a defendant's violation of the Clean Water Act's NPDES permit program.

Moreover, as citizen suit affiant Gail Lee's example in *Laidlaw* illustrates, 120 S.Ct. at 705, the Article III-qualifying injury claimed by the citizen suit plaintiff need not be a "recreational" or "aesthetic" interest in a "U.S. water," it may be to a personal property interest that is directly harmed by a U.S. water's behavior triggered by a Clean Water Act violation committed by the defendant. *See also, accord, Driscoll v. Adams*, 181 F.3d 1285, 1291 (11th Cir. 1999) (landowner's stormwater runoff from construction site drained into stream that intermittently flows as a tributary into Spiva Branch, a "navigable water," injuring economic interests of neighboring property owner), *citing United States v. Eidson*, 108 F.3d 1336, 1341-1342 (11th Cir. 1997) (drainage ditches and manmade canals can qualify as "waters of the United States" for Clean Water Act violation purposes, if they flow into a "navigable water").

2. Notice Pleading, Rule 15(d), & R.C.R.A. Citizen Suits.

This Court should grant a reversal, to correct the Fifth Circuit's failure to reverse the district court's factual detail requirements-based dismissal of the Janiks' alternative claim for a **Resource Conservation & Recovery Act** ("RCRA") citizen suit, — notwithstanding this Court's "notice pleading" doctrine settled in *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 103 (1957), — and notwithstanding a pending **Rule 15(d)** motion to more definitely state the RCRA citizen suit's critical facts (re disposed chemicals defined by the E.P.A. in **40 CFR Pt. 122** as "hazardous substances"; see Janik Appendix Part "C"). In essence, the Fifth Circuit affirmed a judgment on the pleadings, and thereby dismissed the alternative RCRA-based claim as if a RCRA-based

claim had not even been pled at all. However, the plaintiffs provided adequate "notice pleading" of their alternative RCRA citizen suit claim, — satisfying the "notice pleading" doctrine of *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 103 (1957). Accordingly, the Fifth Circuit's affirmance below conflicts with "settled" U.S. Supreme Court precedent. (*See Supreme Court Rule 10(c), regarding conflicts by circuit courts of appeals with federal law "settled" by this Court.*)

Moreover, the Janiks offered to make a more definite statement of their RCRA-based citizen suit claim via Rule 15(d), moving for leave to file a Supplement to their amended complaint. The district court below rejected this practical solution to the RCRA "notice pleading" issue, in direct conflict with this Court's holding in *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962).

Furthermore, the Fifth Circuit's affirmance of the trial court below, on this Rule 15(d)-related issue, contradicts precedents in other federal circuits. *E.g., see Quarantino v. Tiffany & Co.*, 71 F.3d 58, 65-66 (2nd Cir. 1995) ("leave to file a supplemental pleading should be freely permitted when the supplemental facts connect it to the original pleading"); *LaSalvia v. United Dairymen*, 804 F.2d 1113, 1119 (9th Cir. 1986), *cert. denied*, 482 U.S. 928, 107 S.Ct. 3212 (1987) (Rule 15 supplements to pleadings should be freely permitted when supplemental facts connect the supplemental pleading to the original pleading's focal fact allegations). Thus, the Fifth Circuit's treatment of Rule 15(d) in the Janik case clashes with Rule 15(d)'s treatment by the Second and the Ninth Circuits. (*See Supreme Court Rule 10(a), regarding "conflicts" in the federal circuits.*)

In effect, the Janiks' Rule 15(d) motion would have been granted in the Second Circuit and in the Ninth Circuit, and thus the Janiks would have, there, been allowed a "day in court" to prove up their alternative RCRA-based claim facts, *e.g.*, the RCRA-relevant facts provided in the Rule 56(e) declarations of expert witnesses Brandon, McElyea, and Egbert). This is a

particularly clear-cut case of the defendant having no "unfair prejudice" by the Rule 15(d) filing, because the plaintiffs' critical fact-pleading therein represented RCRA-relevant data that was repeatedly and wrongfully withheld (i.e., not produced) by the city during the discovery phase, as **Doc #348** demonstrates. *See, accord, Patterson Farm, Inc. v. City of Britton, S.D.*, 22 F. Supp.2d 1085, 1093 (D.S.D. 1998) ("However, because the City has not provided plaintiff in this case with all of the relevant records, the City's motion for summary judgment cannot prevail. Nor has the City offered sufficient evidence to refute the allegation that it has violated its NPDES permits by failing to abide by inspection and record keeping provisions . . .").

2-A. Notice Pleading Requirements for R.C.R.A. Citizen Suit.

In more particularized summary, the first half of this second federal question is whether the Third Amended Complaint satisfied federal "notice pleading" standards for **Resource Conservation & Recovery Act** citizen suit relief available under 42 U.S.C. § 6972, — pursuant to the "notice pleading" doctrine of *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 103 (1957):

> **The . . . Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claims. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.** The illustrative forms appended to the Rules plainly demonstrate this. **Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial proceedings established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.** . . . The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive

> to the outcome and [we] accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Conley, 355 U.S. at 47-38, 78 S.Ct. at 103 (emphasis added).

The Janiks' Third Amended Complaint [**Doc #188, at pp. 75-80**] pled *in the alternative* for "other appropriate relief available under 42 U.S.C. § 6972," in conjunction with complaint allegations suggesting that city discharges of *untreated* sewage constituted RCRA violations (and thus did not qualify for 42 U.S.C. § 6903(27)'s exemption regarding *treated* domestic sewage), being disposals of hazardous substances that posed (and still pose) a substantial present or potential hazard to human health or the environment when improperly managed and/or improperly disposed of, due to the defective conditions of the city's sanitary sewer line's pre-treatment conveyance piping.

Though the Janiks still allege (as per page 81 of **Doc #188**) that this case is more of a Clean Water Act/nuisance case than a "RCRA-rooted action *per se*", the plaintiffs still reserve the right (as suggested in ¶77b of said **Doc #188**'s page 81) to assert the RCRA citizen as the leading federal claim *if* plaintiffs are disallowed to sue under the Clean Water Act.

The 3rd Amended Complaint itself explicitly requested "appropriate relief, including but not limited to: ... appropriate relief available via 42 U.S.C. § 6972" — which statutory section this Court can judicially notice is RCRA's citizen's suit provision.

Moreover, the general "pleading picture" described by the Janiks' pleadings qualifies the Janiks' case within RCRA case law standards regarding the RCRA citizen suit provision's critical terms: "imminent," "substantial," and "endangerment". **"Imminent"**, for RCRA citizen suit purposes, refers to the nature of the threat, rather than identifying the expected time when of the threat's emergency occurrence. *Dague v. City of Burlington*, 935 F.2d Cir. 1343, 1355-1356 (2d Cir. 1991). *See* **Doc #318**

at 11-18, esp. at 18; Doc #332 at 3 (¶5b, ¶6); **Doc #331 at 3** (¶5b, ¶6). **"Endangerment"**, for RCRA citizen suit purposes, means "a threatened or potential harm and does not require proof of actual harm." *Quoting Dague*, 935 F.2d at 1356. *See* **Doc #318 at 11-18, esp. at 18; Doc #332 at 3** (¶5b, ¶6); **Doc #331 at 3** (¶5b, ¶6). As to **"substantial"** endangerment, *see* **Doc #318 at 11-14, 18.** Plaintiffs' Rule 15 motion was never explicitly ruled on prior to the expiration of the trial court's jurisdiction over the City of Dallas side of this litigation. Accordingly, this Court should rule that RCRA's requirements for pleading a citizen suit were satisfied by the Janiks' "notice pleading" in **Doc #188, esp. at pages 75-82, ¶¶ 75-80**). (*Accord, see* **Doc #318 at 11-18; Doc #140**). The Janiks, as RCRA citizen suit plaintiffs, should be granted their "day in court".

2-B. Abuse in Rejecting Rule 15 Supplement to Complaint.

Even if plaintiffs were incorrect in their argument 2-A above, plaintiffs should nevertheless be permitted to try their RCRA-based claim as a citizen suit clarified by their attempted "more definite statement" in their Supplement, pursuant to Rule 15(d). In more particularized form, the second half of this second federal question is whether a district court can refuse, without abusing its **Fed.R.Civ.P. Rule 15** discretion, to accept filing of a Rule 15 supplement to an amended complaint, in order to permit a plaintiff's more definite statement regarding a **RCRA** citizen suit pleading under 42 U.S.C. § 6972.

This result is especially proper in this case, since the Janiks' submitted Rule 15 supplemental pleading described and summarized E.P.A.-mandated monitoring data involving 21 disposed chemicals (all 21 being defined by the E.P.A. in **40 CFR Pt. 122** as "hazardous substances"), of direct relevance to the originally pled complaint facts, and did so within a discovery-framed context that clarified that there could be no Rule 15-related showing of unfair prejudice to the defendant.

In this case, the reason for the plaintiffs' delay in pleading the names of the 21 "hazardous substances" (improperly "disposed" by the city) was that the city did not properly produce the monitoring data in discovery, despite defendant's knowledge that the citizen suit focused on defendant's discharges of pollutants into a tributary network of a navigable river. See **Doc #348**.

As noted above, the Second Circuit utilized the *Quarantino* case to define a trial court's Rule 15(d) discretion. In the *Quarantino* case the plaintiff added a new claim for relief; in the Janiks' case, however, only a "more definite statement" of the "alternative" RCRA citizen suit allegations was sought. (Compare **Doc #188**, at complaint pages 75-82, with **Doc #348**, at pages 1-16, plus its attached proposed "Supplement" at pages 1-6.) Despite *Quarantino* being cited to the trial court (**Doc #347**, page 4), it denied the Janiks' Rule 15 motion by implication (in **Doc #352**) and by a later ruling (**Doc #360**) that issued after appeal was noticed (**Doc #358**). Accordingly, the Fifth Circuit's affirmance below represents a "split" in the circuit courts of appeals regarding a trial court's discretion to accept or reject the filing of a Rule 15 supplement.

Accordingly, denial of the Janiks' Rule 15(d) motion — which attempted to add hazardous substance disposal allegations not know earlier due to improper discovery obstruction by the city — was an abuse of discretion that prejudicially rewarded the city's improper discovery tactics. *See, accord, Patterson Farm, Inc. v. City of Britton, S.D.*, 22 F.Supp.2d 1085, 1093 (D.S.D. 1998).

3. Rule 56(e) Requirements for Nonmovants.

This Court should grant a reversal of the Fifth Circuit's affirmance below, to correct the ruling that a nonmovant's **Rule 56(e)** evidence, including expert and fact witness declarations, may be deemed "undesignated" (and thus be ignored without meaningful Rule 56 evaluation) by a district court, when the nonmovant's Rule 56(e) initial objection omitted pagination

cites to such Rule 56(e) declarations, — notwithstanding this Court's substance-over-form norm settled in *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553 (1986). A reversal of such a ruling is especially appropriate in this case, since the nonmovants immediately "cured" the supposed problem by promptly filing a nonmovant's motion for reconsideration that provided pagination-cites and proof indexing.

In more particularized form, this third federal question is whether a district court may repeatedly decline to meaningfully evaluate the provable merits of a nonmovant's **Rule 56(e)** evidence, — notwithstanding this Court's substance-over-form norm within *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553 (1986), — by deeming nonmovant's Rule 56(e) evidence as "undesignated" because nonmovant's first Rule 56 response did not expressly cross-reference Rule 56(e) declarations' page numbers, despite the Rule 56(e) record being promptly "cured" 9 days later.

Specifically, the 10-15-1997-entered interlocutory ruling that faulted the Janiks for having "undesignated" evidence [**Doc #238**] was later vacated as of 4-16-1998 [**Doc #342**], followed by a similar interlocutory ruling that continued to suggest that the Janiks' Rule 56(e) evidence was still "undesignated," although is was no longer (as of 10-24-1997, when **Doc #241** cured and/or mooted any possible "undesignated" Rule 56(e) evidence problem). This usage of a interlocutory partial summary judgment, post-vacatur, so that a substitute ruling later recited an "undesignated" record, when no such "undesignated" record then existed, was a reversible error that was later incorporated by reference into the final judgment [**Doc #352**].

The trial court's rejection of the Janiks' Rule 56(e) proof, including the expert witness and fact witness declarations, was a punitive sanction that exceeded Due Process boundaries. Because the trial court's deemed "undesignated" sanction is not authorized

by the text of Fed.R.Civ.P. Rule 56(e), and because it conflicts with the substance-over-form doctrine of *Celotex*, the Fifth Circuit's affirmance below represents a conflict with this Court's "settled" precedent regarding Rule 56(e). (*See Supreme Court Rule 10(c), regarding conflicts by circuit courts of appeals with federal law "settled" by this Court.*) See also, accord, Brunet, "Summary Judgment Materials," 147 F.R.D. 647, 656-657 (1993).

4. Governmental Immunity Versus Federal Preëmption.

This Court should grant a reversal, to correct the Fifth Circuit's approval of **Rule 56** rulings, in a **Clean Water Act/R.C.R.A.** citizen suit context, that deny the application of **Article VI's Supremacy Clause** to preëmptively limit state sovereignty and state statute-grounded "governmental immunity" claimed by a city, as a defense to that city's accountability for its acts or omissions that violate federal environmental statutes. Otherwise, this Court's federalism doctrine and preëmption ruling settled in *Sanitary District of Chicago v. U.S.*, 266 U.S. 405, 425-426, 45 S.Ct. 176, 178 (1924), will go ignored and unenforced.

In more particularized form, this fourth federal question is whether a district court's **Rule 56** rulings in a **Clean Water Act** citizen suit may avoid recognizing that **Article VI's Supremacy Clause** preëmpts a state "governmental immunity" defense as to any municipality's acts or omissions that violate its **NPDES** permit, — when doing so disarms the force of this Court's holding in *Sanitary District of Chicago v. U.S.*, 266 U.S. 405, 425-426, 45 S.Ct. 176, 178 (1924).

By not reaching *(much less discussing)* the issue of federal preëmption *(regarding polluter permit duties)*, the Fifth Circuit negated the NPDES-rooted strict liability bases for the Janiks' claims under both Texas state statutory law (esp. the "TTCA") and Texas state Constitution (Texas' non-negligent "nui-

sance"/"damaging" remedy), so this Court should correct its ruling to accord with federal preëmption law.

Thus, at the trial court level, the district court avoided the implications of both Clean Water Act and RCRA preëmption of state immunity laws to the extent that they involve pollutant "discharge" regulations affecting "navigable water" pollution as well as the "disposal" of "hazardous wastes." This side-stepping of federal environmental regulatory schemes effectively ignored and deviated from *Sanitary District of Chicago v. U.S.*, 266 U.S. 405, 45 S.Ct. 176, 178-179 (1924), a "settled" preëmption precedent regarding navigable waters-related sewage regulation. *(See Supreme Court Rule 10(c), regarding conflicts by circuit courts of appeals with federal law "settled" by this Court.)*

The city's plea of unaccountability, as to its duty to comply with its NPDES permit, is directly contradicted by the city's own sewage treatment plant operational records, which include the following entry that *admits a permit violation:*

> **10/31/93 Sunday D shift**
>
> ...*Surge basin* ***pumps failed,*** *not tripped,* ***causing run-off overload into stormwater system — violation of permit (bypass).*** Sandy hurt hand/wrist on bypass valve at sludge transfer pumps, but **did not want to fill out an accident report.** ... PP system still not feeding out well.

Quoting **Doc #316 at 8 (emphases added).**

In any event, the city cannot legally assert "discretionary powers" to evade the very specific standards, terms, and conditions of its EPA-issued NPDES polluter's permit, such as the specific affirmative and prohibitive standards noted (and quoted) within **Doc #188**, *e.g.*, at page 27's ¶20d(a) (quoting NPDES permit @ page 17 of Part II, § E:

> ...overflows from any part of the publicly owned treatment works collection system are not authorized by

> this permit. Any such overflow not specifically authorized in an NPDES permit would constitute an unpermitted discharge. . . .

and further noting, at page 27's ¶20d(b), that the City of Dallas' NPDES permit @ Part III, § B, ¶2, indicated the city's duty:

> **. . . [to] take all reasonable steps to minimize or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment"). . . .** [emphasis added]

The trial court turned federalism on its head by allowing the City to escape federal accountability from a federally preemptive regulatory scheme (and its mandated strict liability standards), by the city's assertion of a *hierarchically inferior* state-law affirmative defense called "discretionary powers" (TTCA, §101.506). For a state law to be permitted to violate a federal law, Congress must manifest "unambiguous intent" to excuse such violations, *Wyoming v. Oklahoma*, 502 U.S. 437, 112 S.Ct. 789 (1992). No such Congressional intent exists in this case.

Does the City of Dallas regard itself as above federal law? — as above NPDES permit accountability? **Yes, they have even said so:**

> ... the Clean Water Act is not applicable or relevant to this case. Defendant [*City of Dallas*] admit[s] that Plaintiffs have filed this action to seek injunctive relief against the City of Dallas, as stated in . . . Plaintiffs' Third Amended Complaint, but **Defendant [*City of Dallas*] denies Plaintiffs are entitled to such relief, and further denies it is required to report any discharges of untreated sewage onto Plaintiffs' premises pursuant to its NPDES permit. Defendant [*City of Dallas*] admits that it did not report any alleged discharge of sewage into the sanitary storm sewer [*sic*] near Plaintiffs' premises.**

Quoting City of Dallas' First Amended Original Answer [**Doc #190**], page 15 (emphasis added).

Yet, under Supremacy law, the city may not constitutionally justify its claim that its nuisance law-based immunity and state statute-defined "discretion" escapes federal NPDES permit violation consequences. *Accord, U.S. v. Gulf Park Water Co., Inc.*, 972 F. Supp. 1056, 1059 (S.D. Miss. 1997) (discharge from sewage treatment plant was "pollutant"; compliance with Clean Water Act is strict liability matter); *Ward v. Coleman*, 423 F. Supp. 1352, 1357 (D.C. Okla. 1976) (federally mandated "performance rather than excuses" is what the Clean Water Act imposes on polluters); *U.S. v. Allegheny Metal Finishing Co.*, 696 F. Supp. 275, 281, 283, 285-286 (W.D. Mich. 1988) (NPDES permit-holder held strictly liable for violating "technology-forcing" RCRA standards, due to the permit-holder's unapproved waste storage/disposals). The very least that the city should have done, due to its NPDES duty to "mitigate" adverse health impacts, would be to have promptly **warned** the Janiks about the biohazardous situation, especially as to contaminating, airborne colony-forming bio-aerosols and sewage-borne toxin-containing hazardous wastes:

> The City of Dallas man *did not offer to help clean* nor *did he give us any warnings* as to the seriousness of such raw sewage exposure. He *did not warn* us that breathing the air above such an overflow was very dangerous to our health.

Quoting **Doc #122 at 3, ¶12** (Mrs. Janik's declaration; emphasis in original). A failure to warn in such a situation, as a matter of law, must be a violation of the NPDES permit "duty to mitigate".

CONCLUSION

The City of Dallas is a city government that: (1) *had and has a* ***duty*** *to obey* ***federal pollution laws and standards;*** (2) ***breached*** *many of those duties, and yet continues to do so;*

(3) *thereby* ***caused illnesses and property losses*** *to four Dallas residents, who are now serviced by Dallas Water Utilities and are (as others) still at risk.* Also, Texas state nuisance law must be interpreted in a manner that does *not* thwart federal preëmption law (which **imposes NPDES and RCRA duties on the City of Dallas,** with its **strict liability** violation accountabilities), despite City claims of "discretion" immunity.

The Janiks are a family who have resided in and who continue to reside in the City of Dallas, and their sanitary sewer utilities are supplied by and serviced by the City of Dallas.

To the extent that the City of Dallas continues to violate its EPA-issued NPDES permit's terms and conditions:

(a) such as the mandatory obligation of the city to take actions **to prevent** the unpermitted discharges of untreated sewage from the city's sanitary sewer system,

(b) such as the city's mandatory obligation **to properly monitor and to report** to the EPA its sanitary sewer system's discharges, and

(c) such as the city's mandatory obligation **to mitigate harms to human health and the environment** caused by unpermitted discharges from the city's sanitary sewer system, —

the Janiks (like other Dallasites serviced by Dallas Water Utilities) stand at risk of a re-run of their untreated sewage-discharge-caused physical health injuries and personal property losses. The Janiks, as much or more than any other family of Dallas residents, are proper "citizen suit" plaintiffs who have suffered injury from NPDES violations, and who continue to be threatened with imminent re-injury from similar non-mitigation episodes caused by the continuing non-compliance of and institutionalized policy of unaccountability of the City of Dallas, with respect to its NPDES permit. The institutionalized policy and

practice of the city is such that the cause of the city's NPDES permit non-compliance problem is still "unfixed". The City of Dallas' defective sanitary sewer system is one of the oldest and largest in the nation — it is an inadequately managed time-bomb waiting to explode with harms again, to revisit someone with the Janiks' nightmare, or with the Shades' nightmare,[5] despite the fact that accountability respecting and compliance with the city's NPDES permit would provide preventive protection against this continuing non-compliance and imminent threat of harm to human health and/or to the environment, including but not limited to imminent harm to the artificial tributary network of the natural tributary basin of the Trinity River, which is a navigable river of the United States, preëmptively regulated by the Clean Water Act.

Moreover (or alternatively), the Janiks have standing to seek and have properly pled for citizen suit remedies under RCRA, due to the city's unauthorized disposal of EPA-defined hazardous substances on or about October 31, 1993 (**Doc #318**, pp. 13-18 cross-referenced to 40 CFR Pt. 122, App.D, Table V), — despite non-production of the city's monitoring reports regarding such hazardous substances, which discovery non-compliance delayed the Janiks' ability to amend their pleadings with a more definite statement of their RCRA claim. Under Article III as it is interpreted in *Laidlaw*, and as it is interpreted outside of the Fifth Circuit, the Janiks are "stakeholders" with constitutional "standing" to sue as citizen suit plaintiffs under the Clean Water Act who assert their own injuries caused by the city's NPDES permit violations. Also (or alternatively), the Janiks seek RCRA-based citizen suit remedies. **In particular, the Janiks seek proper civil penalties, injunctive relief, remedial appointment of a master (if necessary), declaratory relief, costs and attorneys fees, and other proper relief from the challenged rulings below, —**

[5] See *Shade v. City of Dallas*, 819 S.W.2d 578 (Tex. App. — Dallas 1991, no writ) (untreated sewage wastewater case).

pursuant to this honorable Court's granting of a Writ of Certiorari to the Fifth Circuit Court of Appeals, followed by a reversal of the rulings below (that relate to the City of Dallas), and otherwise providing proper relief for petitioners.

Respectfully submitted,

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Date: Oct. 26, A.D. 2000

Supreme Court, U.S.
(2) FILED

No. 00 684 OCT 27 2000

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ERNEST A. JANIK, JR., individually, on behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik; LEAH EILEEN JANIK, individually, on behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik,

Petitioners,

v.

CITY OF DALLAS, TEXAS,
an incorporated municipality,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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(separate volume, supporting Petition for Writ of Certiorari)

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APPENDIX PART A

U.S. Court of Appeals
Filed

August 3, 2000

In the United States Court of Appeals
for the Fifth Circuit

No. 98-10781

ERNEST A JANIK, JR, individually, on behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik; LEAH EILEEN JANIK, individually, on behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik, Plaintiffs-Appellants,

v.

CITY OF DALLAS TEXAS, Etc, et al, Defendants,

CITY OF DALLAS TEXAS, an incorporated municipality, Defendant-Appellee.

No. 98-11369

ERNEST A JANIK, JR, Individually, On behalf of Grant Joseph Janik, On behalf of Tyler Newman Janik; LEAH EILEEN JANIK, Individually, On behalf of Grant Joseph Janik, On behalf of Tyler Newman Janik, Plaintiffs-Appellants,

v.

CITY OF DALLAS TEXAS, Etc; et al, Defendants

AMICA MUTUAL INSURANCE CO, A Rhode Island Company; INSURANCE ADJUSTMENT SERVICES OF TEXAS INC, A Texas Corporation, Also known as Insurance Adjustment Services, Also known as Insurance Adjustment Services Inc; NOBEL SERVICE CORPORATION, A Delaware Corporation, Doing business as Insurance Adjustment Services Inc, Defendants-Appellees.

— — — — — — —

Appeals from the United States District Court for the Northern
District of Texas, Dallas

— — — — — — —

ON PETITION FOR REHEARING

Before GARWOOD, WIENER and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

Entered for the Court:

/s/ WILL GARWOOD

United States Circuit Judge

REHG-2

CLERK'S NOTE:

See FRAP and Local Rules 41 for stay of the mandate.

U.S. Court of Appeals
Filed

July 6, 2000

In the United States Court of Appeals
for the Fifth Circuit

No. 98-10781

ERNEST A. JANIK, JR., Individually, On Behalf of Grant Joseph Janik, On Behalf of Tyler Newman Janik; Leah Eileen Janik, Individually, On Behalf of Grant Joseph Janik, on Behalf of Tyler Newman Janik, Plaintiffs-Appellants,

v.

CITY OF DALLAS, TEXAS, Etc., et al, Defendants,

CITY OF DALLAS, TEXAS, an Incorporated Municipality, Defendant-Appellee.

No. 98-11369

ERNEST A. JANIK, JR., Individually, On Behalf of Grant Joseph Janik, On Behalf of Tyler Newman Janik; Leah Eileen Janik, Individually, On Behalf of Grant Joseph Janik, on Behalf of Tyler Newman Janik, Plaintiffs-Appellants,

v.

CITY OF DALLAS, TEXAS, Etc., et al, Defendants,

AMICA MUTUAL INSURANCE CO., a Rhode Island Company; Insurance Adjustment Services of Texas Inc., a Texas Corporation, Also Known as Insurance Adjustment Services, Also Known as Insurance Adjustment Services Inc; Nobel Service Corporation, a Delaware Corporation, Doing Business As Insurance Adjustment Services Inc., Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Texas
3:95-CV-2594-D

Before GARWOOD, WIENER and DENNIS, Circuit Judges.[1]

GARWOOD, Circuit Judge:

Plaintiffs-appellants Ernest A. Janik, Jr., and Leah Eileen Janik, individually, and as next friends of their minor children, (collectively, the Janiks) filed suit against defendants-appellees the City of Dallas (the City), AMICA Mutual Insurance Co. (AMICA), IAS Claim Services, Inc., (IAS), and Nobel Service Corp. (Nobel)[2], seeking recovery for personal and property damage resulting from a sewage leak in the basement of a home they were leasing and from the handling of their insurance claims for losses caused by the sewage leak. The Janiks brought numerous claims against the City, against AMICA (the Janiks' insurer), and against IAS and Nobel (their insurance adjustors). In a series of orders, the district court granted the City summary judgment on all claims against it. With regard to AMICA, IAS, and Nobel, the district court granted summary judgment in their favor on several, but not all, of the Janiks' causes of action. The Janiks' remaining claims against AMICA, IAS, and Nobel proceeded to trial, and the jury returned one liability question favorable to the Janiks against AMICA and IAS. The district court, however, entered judgment in favor of AMICA and IAS on this jury finding, on the basis that there was no causal link between the sole

[1]Pursuant to 5th Cir. R. 47.5 the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

[2]The Janiks also named Floyd E. Meyers, Noble Holdings, Inc., and Insurance Adjustment Services of Texas, Inc., as defendants to this action. These defendants, however, were later dismissed from the case and are not parties to this appeal.

liability finding and the damages finding. The Janiks appeal on numerous points. We affirm.

FACTUAL AND PROCEDURAL HISTORY

In 1993, the Janiks lived in a home they were renting at 5509 Melshire Boulevard in Dallas, Texas. On Sunday, October 31, 1993, the Janiks returned home from church to discover a liquid seeping into their home. The Janiks attempted to clean their home and furnishings until discovering that the water was in fact untreated sewage water. The Janiks then stayed with a neighbor for several days and soon moved to a different residence.

Seeking recovery for the property damage they suffered, the Janiks filed a claim under their renter's insurance policy with AMICA. The day after discovering the sewage in their leased home, the Janiks orally notified AMICA of their claim. AMICA then referred the claim to IAS, an independent claims adjuster, which opened a file on the Janiks' insurance claims on November 2, 1993. Blackmon Mooring Steamatic (Blackmon Mooring) was retained to assist in the cleaning and moving of the Janiks' personal property.

Problems, unfortunately, soon arose. The Janiks considered AMICA and the claims adjustors to be engaging in deliberate delay and misrepresentation in processing the Janiks' claims. After several attempts by Blackmon Mooring to clean the personal property to the Janiks' satisfaction, AMICA decided to treat the Janiks' claim as a constructive total loss. IAS recommended that the Janiks receive $60,000 — their policy limit. However, Blackmon Mooring was owed $15,900 for its cleaning and moving services, and a dispute arose over whether AMICA would pay the full $60,000 directly to the Janiks who would then pay Blackmon Mooring or issue two checks, one to the Janiks and the other to Blackmon Mooring. Eventually, the Janiks paid Blackmon Mooring themselves, and AMICA then released the entire $60,000 to

the Janiks. In addition to the $60,000 payment for unscheduled personal property, AMICA also provided the Janiks $4,425 in coverage for additional living expenses. Although the Janiks do not contend that they received less coverage than they were entitled to under the policy, they do assert extra-contractual damages on various theories for alleged problems in the handling of their claim. The Janiks maintain that AMICA improperly delayed payment and improperly demanded proof of loss for payment, when the requirement for such proof was waived by AMICA.

On October 30, 1995, the Janiks filed suit against the City, alleging that the City was responsible for the sewerage leak and the resulting personal and property damages they suffered. The Janiks sought recovery under various theories, including trespass, conversion, nuisance, the Texas Constitution, the Federal Clean Water Act, 33 U.S.C. §§ 1251-1387 (CWA), the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001-101.109 (TTCA), the Texas Water Code, the Texas Solid Disposal Act, the Federal Declaratory Judgment Act, the Texas Declaratory Judgment Act, and violations of the Fourteenth Amendment of the United States Constitution. In their third amended complaint, the Janiks referenced the Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (RCRA), as an alternative standard to support their claims under the CWA and state nuisance law. In a series of orders, the district court granted summary judgment in favor of the City on each claim asserted by the Janiks.

In the same complaint, the Janiks also named AMICA, IAS, and Nobel as defendants. The Janiks alleged *inter alia* that AMICA, IAS, and Nobel were liable for negligence, gross negligence, civil conspiracy, breach of fiduciary duty, breach of contract, quasi-contract, economic coercion and undue influence, violations of the Texas Deceptive Trade Practices Act (DTPA), violations of the Texas Uniform Fraudulent Transfer Act (TUFTA), and Texas

Insurance Code violations, all in connection with their conduct and representations while adjusting the Janiks' insurance claims.[3] In a series of orders, the district court granted summary judgment in favor of AMICA on the following causes of action asserted by the Janiks: breach of fiduciary duty, quasi-contract, economic coercion and undue influence, and DTPA violations. The district court also granted IAS summary judgment on the Janiks' claims against it for civil conspiracy and economic coercion. The remaining claims were tried before a jury.

In August 1998, The Janiks remaining claims against AMICA, IAS, and Nobel proceeded to trial. At the close of the Janiks' case, the district court granted the defendants judgment on the Janiks' TUFTA claim. The district court then submitted the charge to the jury. The charge included the following liability issues: breach of contract, breach of the duty of good faith and fair dealing, negligence, gross negligence, negligent misrepresentation, civil conspiracy (as to AMICA), and nineteen insurance code violations. The jury answered "yes" to only one liability question, finding that AMICA and IAS violated the Texas Insurance Code by "[f]ailing to acknowledge with reasonable promptness pertinent communications with respect to claims arising under the policy." The jury made a damages finding of $2,815.75, representing the "out of pocket costs to plaintiffs to clean plaintiffs' consumer goods, other than those requiring special remediation efforts, as to those items that can be cleaned at a cost less than

[3]Against AMICA, the Janiks sought recovery for breach of contract, quasi-contract, DTPA violations, bad faith, negligence, gross negligence, economic coercion and undue influence, breach of fiduciary duty, the Texas Declaratory Judgment Act, the Federal Declaratory Judgment Act, civil conspiracy, unconscionability, and Texas Insurance Code violations. The claims against IAS were based upon negligence, gross negligence, economic coercion and undue influence, civil conspiracy, Texas Insurance Code violations, DTPA violations, and TUFTA violations. The Janiks sought recovery from Nobel for alleged TUFTA violations.

the cost of replacement." The jury apportioned responsibility for the loss at twenty-five percent to AMICA and seventy-five percent to IAS.

The district court, however, ruled that the jury's liability finding bore no relationship to the damages finding, specifically determining that there was no evidence of any out-of-pocket expenses incurred by the Janiks as a result of any delayed or inadequate communication by IAS and AMICA. Therefore, the district court entered judgment in favor of AMICA and IAS. The Janiks filed motions for reconsideration, new trial, and judgment as a matter of law. The district court denied relief on these motions. The Janiks then timely appealed.

DISCUSSION

On appeal, the Janiks assert that the district court erred in its disposition of their claims against the City, AMICA, IAS, and Noble. We affirm.

I. The City

The district court granted the City's motions for summary judgment on all of the Janiks' claims. On appeal, the Janiks contend that the district court committed error in four respects: (1) the district court's finding that the Janiks lacked Article III standing to assert a CWA claim; (2) the district court's decision that the Janiks had not stated a cause of action under the RCRA[4];

[4]On appeal, the Janiks contend that even if the district court correctly determined that they had failed to state a claim under the RCRA, the district court erred in refusing their motion to amend their pleadings pursuant to Rule 15 of the Federal Rules of Civil Procedure. Whether a party should be allowed to amend his pleadings is a decision left to the sound discretion of the district court. *See Moody v. FMC Corp.*, 995 F.2d 63, 65 (5th Cir. 1993). The Janiks filed their Rule 15 motion to amend their pleadings to include an RCRA claim on May 22, 1998, more than two and one-half years after filing this action and after three

(3) the district court's conclusion that the City was not liable under the TTCA; and (4) the district court's determination that the City's actions did not constitute a nuisance and, therefore, did not result in an unconstitutional takings. With regard to the first two issues, we agree with the district court for the reasons stated in its orders, but write further to address the last two points raised by the Janiks.

We review a grant of summary judgment applying the same standard as the court below was required to apply. *See King v. Chide*, 974 F.2d 653, 655 (5th Cir. 1992). Summary judgment is proper when no issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See id.* at 656. Summary judgment evidence is viewed in the light most favorable to the nonmovant, in this case, the Janiks, and questions of law are reviewed *de novo*. *See id.* We may affirm a judgment on any basis raised below and supported by the record. *See Davis v. Scott*, 157 F.3d 1003, 1005 (5th Cir. 1998); *Davis v. Liberty Mut. Ins. Co.*, 525 F.2d 1204, 1207 (5th Cir. 1976); *see also* 10A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2716, at 290 (3d ed. 1998).

The Janik's claims under nuisance and the TTCA are governed by Texas law. When adjudicating claims for which state law provides the rules of decision, we are bound to apply the law as interpreted by the state's highest court. *See Transcontinental Gas v. Transportation Ins. Co.*, 953 F.2d 985, 988 (5th Cir. 1992). If the state's highest court has not spoken on a particular issue, "it is the duty of the federal court to determine as best it can, what the highest court of the state would decide." *Id.* When making such a determination, we are bound by an intermediate state appellate court decision unless "convinced by other persuasive data that the highest court of the state would decide other-

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previous amendments to their pleadings. We cannot conclude that the district court abused its discretion in refusing the Janiks' request for a fourth amendment.

wise." *First Nat'l Bank of Durant v. Trans Terr Corp.*, 142 F.3d 802, 809 (5th Cir. 1998) (internal quotations and footnote omitted). We, however, "will not expand state law beyond its presently existing boundaries." *Rubinstein v. Collins*, 20 F.3d 160, 172 (5th Cir. 1994) (footnote omitted).

We will first consider the Janiks' claim under the TTCA. Before the Texas legislature enacted the TTCA, liability against a municipality for the negligence of its representatives depended upon the classification of the activity at issue as either a governmental function or a proprietary function. *See Dilley v. City of Houston*, 222 S.W.2d 992, 993 (Tex. 1949). The former was shielded by sovereign immunity, while the latter was not. Under this scheme, if a municipality decided to provide sewer services, such services were classified as a proprietary function and, therefore, not afforded immunity. *See City of Tyler v. Likes*, 962 S.W.2d 489, 502 (Tex. 1997) ("Common law classified operation and maintenance of storm sewers as proprietary functions for which a municipality could be sued."). The TTCA, however, has largely done away with this classification system. Under the TTCA, sovereign immunity applies to negligence claims arising from a municipality's construction, operation, and maintenance of its sewer systems, except to the extent such immunity is waived by the TTCA. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021

(1997)[5] *id.* § 101.0215.[6] Accordingly, the TTCA narrowed municipal liability for damages caused by sewer systems. *City of Tyler*, 962 S.W. 2d at 504.

The Janiks alleged below, and reiterate on appeal, that the City's employees utilized motor-driven equipment when repairing a sewer line in their neighborhood. The Janiks contend that this equipment caused the sewage to seep into their home, thereby falling within the purview of section 101.021 of the TTCA (*see* note 5, *supra*). Under the TTCA, the City is immune from liability for the intentional torts of trespass and conversion asserted by the

---

[5]Section 101.021 of the Texas Civil Practice and Remedies Code states as follows:

"A governmental unit in the state is liable for:

(1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:

(A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and

(B) the employee would be personally liable to the claimant according to Texas law; and

(2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law."

[6]Section 101.0215 reads in pertinent part:

"(a) A municipality is liable under this chapter for damages arising from its governmental functions, which are those functions that are enjoined on a municipality by law and are given it by the state as part of the state's sovereignty, to be exercised by the municipality in the interest of the general public, including but not limited to:

. . .

(9) sanitary and storm sewers;

. . .

(32) water and sewer service; and

. . .

Janiks. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.057.[7] In response to an interrogatory, the Janiks stated that they "have not asserted any 'negligence' cause of action (or 'count') against the City of Dallas." As the City is immune for any intentional tort alleged against it and the Janiks have not sought recovery under a negligence theory, there is no remaining basis for liability under the TTCA. Therefore, the district court's grant of summary judgment in favor of the City on the Janiks' claim under the TTCA is affirmed.

The Janiks also sought recovery under a state-law takings claim, which they based on the doctrine of nuisance. Texas courts have split actionable nuisance into three categories: (1) the negligent invasion of another's interest; (2) the intentional invasion of another's interest; and (3) other conduct, culpable because it is abnormal and out of place in its surroundings, that invades another's interests. *See City of Tyler*, 962 S.W.2d at 503. As noted previously, the Janiks do not allege that the City acted negligently; therefore, the first category of nuisance is inapplicable. Although several pre-*City of Tyler* Texas courts of appeals' decisions suggest that the Janiks may recover under the abnormal and unusual condition branch of nuisance, *see Bible Baptist Church v. City of Cleburne*, 848 S.W.2d 826 (Tex. App.–Waco 1993, writ denied); *Shade v. City of Dallas*, 818 S.W.2d 578 (Tex. App.–Dallas 1991, no writ)[8], the Janiks' pleadings do not

[7]Section 101.057 provides as follows:

> "This chapter does not apply to a claim:
>
> (1) based on an injury or death connected with any act or omission arising out of civil disobedience, riot, insurrection, or rebellion; or
>
> (2) arising out of assault, battery, false imprisonment, or any other intentional tort, including a tort involving disciplinary action by school authorities."

[8]However, when considering a nuisance claim from excessive flooding caused by culverts and a drainage channel, the Texas Supreme Court focused on whether the culvert system was abnormal and out of place in

contain an allegation that any conduct by the City was "abnormal and out of place in its surroundings." Therefore, the Janiks are relegated to the second type of nuisance-intentional nuisance.

We again look to the Texas Supreme Court's decision in *City of Tyler* for guidance. Likes's home was damaged after a drainage channel and culverts owned by the City of Tyler flooded from heavy rains in the area, and Likes sought recovery from the City of Tyler under a nuisance theory. *See City of Tyler*, 962 S.W.2d at 503. The Texas Supreme Court held, as a matter of law, that the City of Tyler "did not intentionally do anything to increase the amount of water in the watershed in which Likes's home was located." *Id.* at 504. The court based this conclusion on the City of Tyler's having completed the culvert system before the Likes's home was built and not having made any improvements since then to increase the amount of water in the watershed where Likes's home was located. *See id.* It is undisputed that the City of Tyler intentionally constructed the culvert system and, therefore, the court's attention must have been focused on the intent to cause the flooding in the vicinity of Likes's home. In the present case, there is no allegation, nor any evidence, that the City intended to cause the sewage flooding in the vicinity of the Janiks' home. Accordingly, the Janiks' takings claim premised on nuisance fails.

In conclusion, the district court did not err in granting summary judgment in favor of the City.

II. Insurance Defendants

The Janiks raise several claims of error in the district court's disposition of their claims against AMICA, IAS, and Nobel. First,

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its surroundings, not whether the resulting flood waters were. *See City of Tyler*, 962 S.W.2d at 504. Similarly, were we to reach the issue in the present case, we would need to address whether the sewer system itself, not the sewage that escaped from that system, was sufficiently abnormal and out of place in its surroundings. There does not appear adequate evidence that it was.

the Janiks appeal the district court's grant of partial summary judgment in favor of AMICA, IAS, and Nobel on the following causes of action: economic coercion and undue influence, civil conspiracy, DTPA violations, breach of fiduciary duty, quasi-contract, and unconscionability. Second, the Janiks contend that the district court erred in declining to find manifest error in the jury's verdict, specifically, that the Janiks had not established their claims for breach of contract and violations of the Texas Insurance Code and greater damages than those awarded by the jury. Third, the Janiks assert that the district court erred granting judgment for IAS and AMICA on the jury's one liability finding in the Janiks' favor.[9] We hold that the district court did not err in any respect and rely on its reasoning in all matters save one. We briefly address the Janiks' contention that AMICA breached the policy by delaying payment of their claims until March 23, 1994, when the Janiks and AMICA had agreed on or around February 15, 1994 that AMICA would pay the Janiks $60,000 under the policy.

The Janiks alleged that AMICA breached the policy by failing to pay the Janiks' claim within the prescribed five-day period after giving notice of its intent to pay their claim. On or around February 15, 1994, AMICA and the Janiks reached an agreement whereby a total loss would be claimed on the Janiks' damaged personal property. Therefore, the Janiks would receive payment for the policy limit of $60,000. However, Blackmon Mooring had submitted a bill for approximately $15,900 in expenses associated

[9]The Janiks raise two additional points of error. First, the Janiks claim that defense counsel engaged in improper jury argument when referring to the Janiks' attorney as stating that the case was about "invisible" harm when the Janiks' attorney in fact said "indivisible" harm. The resulting error, if any, was cured by the district court's instructions to the jury. Second, the Janiks complain that the district court's rulings on motions for summary judgment, new trial, and post-trial judgement as a matter of law collectively deprived them of their Seventh Amendment right to trial by jury. This claim is meritless.

with the cleaning and moving of the Janiks' personal property. Blackmon Mooring's bill was to be paid out of the $60,000 fund, and the Janiks would receive the remaining $44,100. Confusion arose over weather or not the Janiks wanted AMICA to pay Blackmon Mooring directly. The Janiks eventually paid Blackmon Mooring independently. Upon being informed of this payment, AMICA immediately sent the Janiks a check payable to them in the amount of $60,000. Even assuming *arguendo* that AMICA breached the policy by delaying payment to the Janiks,[10] the Janiks have failed to establish any resulting damage from such breach. The Janiks received payment for the policy limit and, thus, the benefit of their bargain with AMICA. Under these facts, there can be no recovery for this alleged breach of the policy.

We find that the district court committed no error in its disposition of the Janiks' claims against AMICA, IAS, and Noble.

CONCLUSION

The judgment of the district court is affirmed.

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[10]AMICA argues that the uncertainty surrounding the method of paying Blackmon Mooring's bill mitigated its duty to pay within five days of notifying the Janiks that they would receive $60,000 in benefits under the policy. In support of its position, AMICA relies on a provision in the policy that states that, if payment of a claim requires performance of an act by the insured, payment of the claim must be made within five business days after the date such act is performed by the insured. As we conclude that the Janiks suffered no injury from the alleged breach, we need not address whether AMICA breached the policy.

[Doc #360] Entered June 30, 1998

In the United States District Court
for the Northern District of Texas
Dallas Division

ERNEST A. JANIK, JR., et al., Plaintiffs,

v.

CITY OF DALLAS, et al., Defendants.

Civil Action No. 3:95-CV-2594-D

ORDER

Plaintiffs' May 22, 1998 motion for leave to supplement and/or leave to amend their complaint is denied.

Plaintiffs seek leave to amend their claim against the City of Dallas (the "City") under the Resource Conservation and Recovery Act (" RCRA"), 42 U.S.C. §§ 6901-6992K. They sought leave to amend after the court filed its May 12, 1998 memorandum opinion dismissing the remaining claims against the City, including their RCRA claim. In view of the untimeliness of the motion, and of the fact that it has been mooted by the filing on May 27, 1998 of a Fed. R. Civ. P. 54(b) final judgment dismissing this action against the City, the court denies the motion.

SO ORDERED

June 29, 1998.

/s/ SIDNEY A. FITZWATER
Sidney A. Fitzwater
United States District Judge

[Doc #352] Entered May 28, 1998

In the United States District Court
for the Northern District of Texas
Dallas Division

ERNEST A. JANIK, JR, et al., Plaintiffs,

v.

CITY OF DALLAS, et al., Defendants.

Civil Action No. 3:95-CV-2594-D

JUDGMENT

For the reasons set out in memorandum opinions and orders filed April 16, 1998 and May 12, 1998, it is ordered and adjudged plaintiffs' action against defendant City of Dallas (the "City") is dismissed with prejudice.

The City's taxable cost of court, as calculated by the clerk of court, are assessed against plaintiffs.

Pursuant to Fed. R. Civ. P. 54(b), the court expressly determines that there is no just reason for delay and directs the clerk of court to enter this as a final judgement.

Done at Dallas, Texas this 27th day of May, 1998.

/s/ SIDNEY A. FITZWATER

Sidney A. Fitzwater
United States District Judge

[Doc #350] Entered May 26, 1998

In the United States District Court
for the Northern District of Texas
Dallas Division

ERNEST A. JANIK, JR., et al., Plaintiff's,

v.

CITY OF DALLAS, et al., Defendants.

Civil Action No. 3:95-CV-2594-D

ORDER

Plaintiffs' May 22, 1998 motion to reconsider or vacate and motion to partially reinstate are denied.

SO ORDERED

May 22, 1998.

/s/ SIDNEY A. FITZWATER

Sidney A. Fitzwater
United States District Judge

[Doc #343] Entered May 13, 1998

In the United States District Court
for the Northern District of Texas
Dallas Division

ERNEST A. JANIK, JR., et al., Plaintiffs,

v.

THE CITY OF DALLAS, et al., Defendants.

Civil Action No. 3:95-CV-2594-D

MEMORANDUM OPINION AND ORDER

Defendant the City of Dallas, Texas (the "City") moves for summary judgment on plaintiffs' putative claim for recovery pursuant to the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992K, negligence claims for personal injury, common law nuisance, nuisance per se, trespass to land, trespass to chattels and conversion, unavailability of the Federal Declaratory Judgment Act for RCRA claim, state-law based negligence claims, and takings claim based on nuisance. For the reasons that follow, the court grants the motion in part and denies it in part.

I

This lawsuit has been the subject of several prior opinions, and the court need not repeat at length the relevant background facts and procedural history. Briefly summarized, plaintiffs Ernest A. Janik, Jr. and Leah Eileen Janik, individually, and as next friends of their minor children, sue several defendants, contending they suffered personal injuries and property damage when sewage backed up into the house they were renting. They sue the City under the Fourteenth Amendment (Takings, Equal Protection,

and Due Process Clauses); the federal Clean Water Act, 33 U.S.C. §§ 1251-1387; the Texas Constitution (Takings, Open Courts, and Due Court of Law articles); the Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 101.001-101.109 (West 1997); the Texas Water Code, Tex. Water Code Ann. § 26.121 (West 1988); the Texas Solid Waste Disposal Act, Tex. Health & Safety Code Ann. §§ 361.001-361.613 (West 1992 & Supp. 1997); the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202; the Texas Declaratory Judgment Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 37.001-37.011 (West 1997); and various other state-law torts. The City assumes that they sue under RCRA.

This court has previously dismissed plaintiffs' claims based on the Clean Water Act, claims brought directly under the United States Constitution (Equal Protection, Due Process, and Takings Clauses); state-law takings claim; "claims" under the Texas Water Code and Texas Solid Waste Disposal Act; "claims" under the Due Course of Law article and the Open Courts provision of the Texas Constitution; property damage from the City's negligence, and prayer for declaratory relief under both the Texas Declaratory Judgment Act and the Federal Declaratory Judgment Act for plaintiffs' negligence claim and claims under the Clean Water Act, Texas Water Code, and Waste Disposal Act.

II

The City moves for summary judgment on plaintiffs' RCRA claim. The court denies the motion, but holds that plaintiffs' have not alleged a separate RCRA cause of action.

As the City points out, plaintiffs' third amended complaint does not plead RCRA as a separate cause of action. Rather, plaintiffs intend to utilize RCRA "to aid in proving up plaintiffs' Clean Water Act-related and nuisance-related causes of action (inter alia), by showing one or more statutory standard violations — so that the Clean Water Act and/or RCRA statutory violations

'convert' the plaintiffs' *common law nuisance* claims into *nuisance per se* claims." Ps. 3d Am. Compl. at 81. This court will not grant summary judgment dismissing a claim that plaintiffs have not pleaded. Accordingly, while acknowledging that no RCRA cause of action has been asserted, the court denies this part of the City's motion.

III

The City also moves for summary judgment on the basis of its defense of sovereign immunity on plaintiffs' negligence claim for personal injury.

"The operation and maintenance of a sanitary sewer is a governmental function" *Parr Golf Inc. v. City of Cedar Hill*, 718 SW.2d 46, 47 (Tex. App. 1986, no writ). Accordingly, the City is immune except to the extent that the Tort Claims Act waives immunity. Under § 101.021, the City is liable for "personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2) (West 1997). Assuming *arguendo* that § 101.021 waives sovereign immunity in the present case, the court must still determine whether the City's actions in maintaining the sewer system come within an exception to the waiver of immunity. The City relies on § 101.056 of the Tort Claims Act, which provides that immunity is not waived when the claim is based upon the government's failure to perform an act that the law does not require it to perform, or where the performance or nonperformance of an act is within the City's discretion.[1] Tex. Civ. Prac. & Rem. Code Ann. § 101.056 (West 1997).

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[1]Section 101.056:

This chapter does not apply to a claim based on:

(1) the failure of a governmental unit to perform an act that the unit is not required by law to perform; or

The City moves for summary judgment on the basis *inter alia* that immunity is not waived because there is no law that requires that it maintain the sewer system in a particular manner. It has met its burden, as the summary judgment movant, of demonstrating its entitlement to summary judgment based on § 101.056. Plaintiffs must therefore raise a legal or genuine and material factual issue that would preclude summary judgment. Plaintiffs have not responded to the City's assertions under § 101.056 and have therefore failed to present such an issue. The court therefore grants summary judgment for the City on its defense of sovereign immunity on plaintiffs' negligence claims for personal injury.[2]

IV

The City moves for summary judgment as to plaintiffs' claims for the intentional torts of trespass to land, trespass to chattels, and conversion.

The City asserts immunity under § 101.057 of the Tort Claims Act, Tex. Civ. Prac. & Rem. Code Ann. § 101.057 (West 1997), which provides, in relevant part, that immunity is not waived for intentional torts.[3] Plaintiffs have not responded to the applicability

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(2) a governmental unit's decision not to perform an act or on its failure to make a decision on the performance or nonperformance of an act if the law leaves the performance or nonperformance of the act to the discretion of the governmental unit.
Tex. Civ. Prac. & Rem. Code Ann. § 101.056 (West 1997).

[2]Plaintiffs contend that the Clean Water Act, 33 U.S.C. §§ 1251-1387, and RCRA preempt Texas sovereign immunity law. Plaintiffs do not have claims, however, under either of these statutes.

[3]Section 101.057(2):
This chapter does not apply to a claim:
(2) arising out of assault, battery, false imprisonment, or any other intentional tort, including a tort involving disciplinary action by school authorities.
Tex. Civ. Prac. & Rem. Code Ann. § 101.057(2) (West 1997).

of this section and have therefore failed to raise a legal or factual issue that precludes summary judgment. Consequently, the court grants summary judgment for the City on plaintiffs' intentional tort claims of trespass to land, trespass to chattels, and conversion.[4]

V

The City moves for summary judgment on plaintiffs' request for declaratory relief under the Federal Declaratory Judgment Act for their RCRA and state-law negligence claims. Because the court has noted that plaintiffs do not allege a RCRA claim, and has granted summary judgment for the City on the state-law negligence claims, the court denies this part of the motion as moot.

SO ORDERED.

May 12, 1998

/s/ SIDNEY A. FITZWATER

Sidney A. Fitzwater
United States District Judge

[4]Because the court has already dismissed plaintiffs' claims for nuisance, nuisance per se, and takings based on nuisance, the court denies as moot the City's motions for summary judgment on these claims.

[Doc #342] Entered April 17 or 20, 1998

In the United States District Court
for the Northern District of Texas
Dallas Division

ERNEST A. JANIK, JR., et al., Plaintiffs,

v.

CITY OF DALLAS, et al., Defendants.

Civil Action No. 3:95-CV-2594-D

MEMORANDUM OPINION AND ORDER

Because plaintiffs have clarified in their October 24, 1997 motion to reconsider that their Texas takings claim is based on nuisance, not on taking by flooding, the court grants their motion to reconsider to the extent that the court vacates its October 14, 1997 memorandum opinion and order and substitutes the following memorandum opinion and order (which changes only § IV of the October 14, 1997 memorandum opinion and order).

Plaintiffs Ernest A. Janik, Jr., and Leah Eileen Janik, individually, and as next friends of their minor children, move for partial summary judgment. Defendant City of Dallas ("City") also moves for partial summary judgment. For the reasons that follow, the court denies plaintiffs' motion and grants in part and denies in part the City's motion.

I

Plaintiffs suffered personal injuries and property damage when sewage backed up into the house they were renting. They sue the City under the Fourteenth Amendment (Takings, Equal Protection, and Due Process Clauses); the federal Clean Water Act, 33 U.S.C. §§ 1251-1387; the Texas Constitution (Takings, Open

Courts and Due Course of Law articles); the Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 101.001-101.109 (West 1997); the Texas Water Code, Tex. Water Code Ann. § 26.121 (West 1988); the Texas Solid Waste Disposal Act, Tex. Health & Safety Code Ann. §§ 361.001-361 613 (West 1992 & Supp. 1997); the federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202; the Texas Declaratory Judgment Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 37.001-.37.011 (West 1997); the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992K; and various other state-law torts. The City moves for summary judgment as to all of plaintiffs' claims except their RCRA claim. Plaintiffs move for partial summary judgment on their Clean Water Act, nuisance per se, takings, and Texas Tort Claims Act claims and their prayer for declaratory relief.

II

The court first turns to the City's motion for partial summary judgment, and its contention that plaintiffs lack statutory and constitutional standing to sue under the citizen suits provision of the Clean Water Act, 33 U.S.C. § 1365.

A

Assuming *arguendo* that plaintiffs have statutory standing under the Clean Water Act through a combination of a discharge violation and other permit violations, the court turns to the City's assertion that the plaintiffs have failed to produce any evidence of constitutional standing. To establish constitutional standing, plaintiffs must show (1) actual or threatened injury, (2) fairly traceable to the City's action, and (3) that the injury will likely be redressed if they prevail in the lawsuit. *Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 360 (5th Cir. 1996) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs have the burden of persuasion in

establishing standing. *Id.* at 361-62 ("Standing is an issue upon which the party invoking federal jurisdiction, the plaintiff, bears the burden of persuasion"). As the summary judgment movant who will not have the burden of proof on this issue at trial, the City need only point the court to the absence of evidence of standing. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *Slaughter v. Allstate Ins. Co.*, 803 F.2d 857, 860 (5th Cir. 1986) (stating that movant must point out to district court absence of evidence showing genuine dispute).

B

The court need only address the second element because plaintiffs have failed to meet the requirement that the injury be "fairly traceable" to any City discharge violation. To establish that their injury is "fairly traceable" to the City's discharge, plaintiffs must establish that the City "has (1) discharged some pollutant in concentrations greater than allowed by its permit (2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that (3) the pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs." *Friends of the Earth*, 95 F.3d at 360-61 (internal quotations omitted). Plaintiffs have failed to adduce any evidence that they have an interest in the Trinity River, which is the relevant waterway in this case.

In general, Rule 56 obligates a party to designate the specific facts in the record that create genuine issues precluding summary judgment. "Rule 56 does not impose a duty on the district court to sift through the record in search of evidence to support a party's opposition to summary judgment." *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 463 (5th Cir. 1996) (citing *Jones v. Sheehan, Young, & Culp, P.C.*, 82 F.3d 1334, 1338 (5th Cir. 1996)); *accord Stults v. Conoco, Inc.*, 76 F.3d 651, 657 (5th Cir. 1996). The court has no obligation to consider evidence that the nonmovant does not bring forth in opposition to the summary judgment

motion. *Doddy*, 101 F.3d at 463 (citing *Copsey v. Swearingen*, 36 F.3d 1336, 1347 n. 9 (5th Cir. 1994)).[1] To satisfy their burden, nonmovants are required to identify specific evidence in the record, and to articulate the precise manner in which that evidence supports their claims. *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir.), *cert. denied*, 513 U.S. 871 (1994) (citing *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.) *cert. denied*, 506 U.S. 825 (1992)). When a party fails to refer to items in the record, the evidence is not properly before the court in deciding whether to grant the motion. *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915 (5th Cir.), *cert. denied*, 506 U.S. 832 (1992); *Nissho-Iwai Am. Corp. v. Kline*, 845 F.2d 1300, 1307 (5th Cir. 1988) (on rehearing) (denying rehearing after plaintiff asserted that deposition was of record when district court granted partial summary judgment, and holding that because plaintiff failed to designate, or in any way refer to, deposition as source of factual support for response to motion, deposition was never made part of competent summary judgment record before district court).

Plaintiffs have haphazardly listed points both in their motion and in their response to the City's motion. They have cited numerous declarations, pleadings, and other materials that they contend support their motion and opposition to the City's motion. They have failed not only to refer to specific pages of these documents in the context of each issue, but even to specify the documents that support their position with respect to each issue. Nowhere in their motion or response do plaintiffs identify their specific interest in the Trinity River. Plaintiffs have therefore

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[1]In *Waheed v. H & R Block, Inc.*, 1993 WL 13319, at *3 (N.D. Tex. Jan. 9, 1993) (Fitzwater, J.), for example, this court criticized a summary judgment nonmovant who "'invite[d]' the court to review the entirety of her two-volume deposition — some 356 pages and accompanying exhibits — 'at its leisure,' to ascertain 'that there are genuine issues of material fact involved in this case.'"

failed to raise a genuine issue of material fact on this issue and to prove this element. The court holds that plaintiffs lack standing to assert a discharge violation under the Clean Water Act.

Plaintiffs also allege other violations of the City's National Pollutant Discharge Elimination System permit, such as a failure to report and mitigate the damage from the flooding. They do not, however, have standing to sue for these violations absent standing to bring suit for the discharge violation. *Friends of the Earth*, 95 F.3d at 362 ("an individual without standing to sue for discharge violations, *a fortiori*, lacks standing to sue for reporting violations") (citing and discussing *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1113 (4th Cir. 1988)).

Accordingly, the court grants the City's motion to dismiss plaintiffs' Clean Water Act claim.

III

The City moves for summary judgment on the Fourteenth Amendment claim for violations of the Equal Protection, Due Process, and Takings Clauses.

In their complaint, plaintiffs ask the court to recognize a cause of action directly under these provisions of the United States Constitution. It is settled, however, that plaintiffs cannot bring a civil action against the City except through the remedial device of 42 U.S.C. § 1983. *Hearth, Inc. v. Department of Pub. Welfare*, 617 F.2d 381, 382-83 (5th Cir. 1980) ("Congress has provided a means of seeking relief against state officials who violate the Constitution"); *Azul-Pacifico, Inc. V. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992) ("Plaintiff has no cause of action directly under the United States Constitution"); *Quality Refrigerated Servs., Inc. v. City of Spencer*, 908 F. Supp. 1471, 1487 n.9 (N.D. Iowa 1995) (concluding that court had no jurisdictional basis to entertain a Takings Clause claim where plaintiff had not invoked § 1983, and stating that "[t]here simply is no direct

cause of action arising under the Constitution itself against municipal officials for alleged constitutional violations."). The court grants the City's motion and dismisses plaintiffs' claims brought directly under the United States Constitution.

IV

The City moves for a summary judgment on plaintiffs' state-law takings claim, which they base on non-negligent nuisance.[2] Such a claim can be asserted under the state takings provision. *Bible Baptist Church v. City of Cleburne*, 848 S.W.2d 826, 830 (Tex. App. 1993, writ denied); *see also Golden Harvest Co., N.H.T. v. City of Dallas*, 942 S.W.2d 682, 689 (Tex. App. 1997, writ denied) ("[n]onnegligent, or intentional nuisance is actionable, and the City is not immune under the Texas Torts Claim Act."). The court agrees.

The City contends that plaintiffs cannot show nuisance. To establish actionable nuisance, plaintiffs must demonstrate (1) intentional invasion of another's interests,[3] (2) negligent invasion of another's interest, or (3) other conduct, culpable because abnormal or out-of-place in its surroundings, that invades another's interests. *Golden Harvest*, 942 S.W.2d at 689. The second type is not at issue in this case. Plaintiffs have failed to adduce competent summary judgment evidence that would permit a reasonable trier of fact to find in their favor. Accordingly, the court grants the City's motion on this ground. Plaintiffs' nuisance, nuisance per se, and state-law takings are dismissed. [4]

[2]Based upon the briefing, the City is not seeking to show immunity; instead, plaintiffs are attempting to prove non-negligent nuisance.

[3]The intent at issue is the intent to cause harm. *City of Tyler v. Likes*, _S.W.2d_ , 41 Tex. Sup. Ct. J. 174, 184 (Tex. Dec. 11, 1997).

[4]The court denies plaintiffs' motion to strike the Stalnaker affidavit, and motion for leave to file controverting affidavit, because the court did not rely on the affidavit.

V

Plaintiffs allude to violations of the Texas Water Code, Tex. Water Code Ann. § 26.121 (West 1988), and the Texas Solid Waste Disposal Act, Tex. Health & Safety Code Ann. §§ 361.001-361.613 (West 1992 & Supp. 1997). To the extent plaintiffs assert separate causes of action for violations of these acts, the court dismisses the claims because plaintiffs do not have a private right of action under either statute. *See* Tex. Water Code Ann. §§ 26.121-26.124 (West 1988 & Supp. 1997) (providing for enforcement by state commission and "enforcement by others," but defining "others" as local governments, the Parks and Wildlife Department, or the Attorney General); *Garland Grain Co. v. D-C Home Owners Improve. Ass'n*, 393 S.W.2d 635, 640 (Tex. Civ. App. 1965, writ ref'd n.r.e.) (holding that "the duty of prohibiting pollution of public waters is vested exclusively in the state."); Tex. Health & Safety Code Ann. §§ 361.001-361.613 (West 1992 & Supp. 1997); *North Alamo Water Supply Corp. v. Texas Dep't of Health*, 839 S.W.2d 455, 459 (Tex. App. 1992, writ denied) ("North Alamo has not indicated how the Solid Waste Disposal Act authorizes a private citizen to bring an enforcement action against a party who appears to have violated a permit provision.").

VI

The City contends that the Open Courts provision of the Texas Constitution, Tex. Const. art. 1, § 13, and the Due Course of Law article, Tex. Const. art. 1, § 19, do not apply to this case. The court agrees.

Plaintiffs have cited no authority for bringing a claim directly under the Open Courts provision. In addition, this article prohibits the Legislature, not the courts, from abrogating or restricting a person's common law cause of action. *See Capellen v. Capellen*, 888 S.W.2d 539, 545 (Tex. App. 1994, writ denied) (holding that

"'open courts' provision is directed at prohibiting the legislature from abrogating or unreasonably restricting a litigant's right to seek redress by way of a well-established common law cause of action.") Plaintiffs do not have a private right of action directly under the Due Course of Law article. *Mitchell v. Amarillo Hosp. Dist.*, 855 S.W.2d 857 (Tex. App. 1993, writ denied) (holding that plaintiffs could not bring a claim directly under § 19 of the Texas Constitution).

VII

The City also moves for summary judgment on the plaintiffs' negligence claim, for which plaintiffs seek to avoid sovereign immunity under the Tort Claims Act.

During construction, operation, and maintenance of its sewer system, the City has sovereign immunity for its negligence, except to the extent waived by the Tort Claims Act. *Shade v. City of Dallas*, 819 S.W.2d 578, 582 (Tex. App. 1991, no writ). In Texas, the Tort Claims Act waives immunity as provided in Tex. Civ. Prac. & Rem. Code Ann. § 101.021 (West 1997)[5] Under the statute, property damage is only recoverable against a governmental unit if the damage arises from the operation of a mo-

[5]Section 101.021 provides:

A government unit in the state is liable for:

(1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:

(A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and

(B) the employee would be personally liable to the claimant according to Texas law; and

(2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

tor-driven vehicle or motor-driven equipment. The operation of the motor-driven vehicle or equipment must cause the property damage. *City of San Antonio v. Winkenhower*, 875 S.W.2d 388, 390 (Tex. App. 1994, no writ).

The City contends that plaintiffs cannot recover for property damage because they have not shown that motor-driven vehicles or equipment caused their loss. The court holds that plaintiffs have failed to raise a genuine issue of material fact concerning the use of motor-driven vehicles or equipment and how it caused their loss. Although plaintiffs have provided a long list referencing all summary judgment evidence filed in the case, they have failed to point the court to a specific item of evidence that creates a fact issue.[6] As the court has explained *supra* at § II(B), Rule 56 does not obligate the court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment. Plaintiffs must identify specific evidence in the record, and articulate the precise manner in which that evidence supports their claims. Therefore, the court dismisses plaintiffs' claim for property damage arising from the City's negligence.

The City also contends that by nature of its discretionary powers in maintaining a sewer system, it is immune from personal injury and property damage under Tex. Civ. Prac. & Rem. Code § 101.056 (West 1997). As the summary judgment movants, the City is initially responsible for informing the district court of the basis of its motion. *Celotex*, 477 U.S. at 323. The court holds that the City has not met its summary judgment burden on this issue because it has not adequately informed the court of the basis for this part of its motion.

[6]Plaintiffs ask the court to consider their "Notice of Supplemental Declaration Identifying Newly Discovered Evidence," filed September 24, 1997. Even were the court to consider this submission in the context of the City's summary judgment motion, the information does not raise a fact issue concerning how the motor-driven vehicles and equipment caused plaintiffs' injuries.

VIII

The City moves for summary judgment dismissing plaintiffs' prayer for relief under both the Texas Declaratory Judgment Act and the Federal Declaratory Judgment Act for plaintiffs' Clean Water Act claim, negligence claim under the Tort Claims Act, Texas Water Code claim, and Waste Disposal Act claim. The court has granted summary judgment for the City as to all of these claims except for the claim for personal injury from negligence pursuant to the Tort Claims Act. In order to entertain a prayer for declaratory relief, there must exist a justiciable case or controversy. *Ashcroft v. Mattis*, 431 U.S. 171, 172-73 (1977) ("[f]or a declaratory judgment to issue, there must be a dispute which calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts") (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 277, 242 (1937); *Barcroft v. State*, 900 S.W.2d 370, 372 (Tex. App. 1995, no writ) (discussing, in context of declaratory judgment action, necessity for justiciable controversy). Consequently, plaintiffs' prayer for declaratory relief based on those causes of action is dismissed as moot.

For other reasons, plaintiffs' prayer for declaratory relief under the Texas Declaratory Judgment Act for the remaining claim of personal injury from the City's negligence is also dismissed. Texas courts have held that declaratory judgment is not appropriate when plaintiff's cause of action for damages on the same claim is justiciable and provides an appropriate remedy. *See Tucker v. Graham*, 878 S.W.2d 681, 683 (Tex. App. 1994, no writ) ("declaratory judgment action is not appropriate where plaintiff's cause of action is mature and enforceable in a pending suit that involves the same parties and the same issues as alleged in the declaratory judgment action"); *Southern Traffic Bureau v. Thompson*, 232 S.W.2d 742, 750-51 (Tex. Civ. App 1950, writ ref'd n.r.e.) ("If adequate relief, and an appropriate remedy, are presently available to the complaining party through the means of

other existing forms of action or proceeding, jurisdiction for a declaratory judgment will not ordinarily be entertained.") (citation omitted). Plaintiffs have a justiciable claim for negligence under the Tort Claims Act. Therefore, declaratory judgment is not appropriate for this claim.

As for declaratory judgment under the Federal Declaratory Judgment Act for plaintiffs' claim for personal injuries from the City's negligence, the City has not met its burden of showing that it is entitled to summary judgment on this issue.

IX

Finally, the City moves for dismissal of plaintiffs' claims for nuisance, nuisance per se, trespass, and conversion.[7] The court may not dismiss plaintiffs' complaint for failure to state a claim pursuant to Rule 12(b)(6) unless it appears beyond a doubt that plaintiffs can prove no set of facts in support of their claims that would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The court must accept as true the complaint's allegations and view them in the light most favorable to plaintiffs for purposes of deciding the motion to dismiss. *Royal Bank of Can. v. FDIC*, 733 F. Supp. 1091, 1094 (N.D. Tex. 1990) (Fitzwater, J.). The court is unable to say that plaintiffs can prove no set of facts entitling them to relief on the basis of their nuisance, nuisance per se, trespass, and conversion claims. Therefore, the court denies this portion of the City's motion.

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[7]The City alternates between asking for summary judgment on these claims and contending that plaintiffs cannot state a claim on which relief can be granted. The court refers to the issues of law presented in the City's motion, which frame the issue under Fed R. Civ. P. 12(b)(6), and decides the motion under the standards for a motion to dismiss.

X

The court next addresses plaintiffs' motion for partial summary judgment.

Plaintiffs move for summary judgment on their Clean Water Act claim, nuisance per se claim, Takings claim, Texas Tort Claims Act, and prayer for declaratory relief. Some of these claims have been eliminated by the court's granting summary judgment in favor of the City. As to those claims that remain viable, the court denies plaintiffs' motion.

Plaintiffs have failed to make cogent and comprehensible legal arguments that are supported by summary judgment evidence specifically designated in the record. Plaintiffs have instead listed allegations, declarations, and other evidence filed with the court at various times. When the party who will have the burden of proof at trial as to a particular claim or defense moves for summary judgment as to that claim or defense, it bears the burden of establishing "beyond peradventure all of the essential elements of the claim or defense." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). The summary judgment nonmovant is not obligated to adduce any summary judgment evidence until the movant has properly supported its motion. *Afco Steel, Inc. v. Tobi Eng'g, Inc.*, 893 F.2d 92, 94 (5th Cir. 1990). The nonmovant may appropriately respond to the motion simply by pointing out that the movant has failed to carry his burden. *Isquith v. Middle South Utils., Inc.*, 847 F.2d 186, 199 (5th Cir.), *cert. denied*, 488 U.S. 926 (1988). Accordingly, the court denies plaintiffs' motion.[8]

[8]The City has also filed motions to strike portions of plaintiffs' summary judgment evidence. The court has not relied on the contested parts of plaintiffs' evidence in deciding the City's motion because plaintiffs have failed to refer to it is context. These motions are also moot in light of the court's denial of plaintiffs' motion.

Plaintiffs object to the City's late filing of its summary judgment motion. The court granted the City leave to file its summary judgment motion on February 6, 1997. The court overrules the objection.

The court denies plaintiffs' motion and grants in part and denies in part the City's motion.

SO ORDERED

April 16, 1998.

By: /s/ SIDNEY A. FITZWATER

Sidney A. Fitzwater
United States District Judge

[Doc #301] Entered November 20, 1997

In the United States District Court
for the Northern District of Texas
Dallas Division

ERNEST A. JANIK, JR., et al., Plaintiffs,

v.

CITY OF DALLAS, et al., Defendants.

Civil Action No. 3:95-CV-2594-D

ORDER

Plaintiffs move for reconsideration of the court's October 14, 1997 memorandum opinion and order granting in part and denying in part defendant City of Dallas' ("the City's") motion for partial summary judgment. Except to direct additional briefing on one issue, the court denies the motion.*

Plaintiffs have clarified in their motion for reconsideration that their Texas Takings claim is based on nuisance and not on taking by flooding. The court directs the City to respond to this aspect of plaintiffs' motion within 20 days of the date this order is filed. Although the City has responded to plaintiff's motion for reconsideration, the court has determined that the response does not adequately address this issue. Plaintiffs shall have 15 days after the response is filed in which to file a reply brief in support of this part of their motion for reconsideration.

The court otherwise declines to reconsider its October 14, 1997 opinion. Plaintiffs have cited in their motion for reconsideration evidence that they contend supports their allegation that their damages were caused by motor-driven vehicles or equipment. It is

* Plaintiffs' request for oral argument is denied. *See* Local Civil Rule LR 7.1(g).

within the court's discretion to consider evidence that plaintiffs failed to point out to the court in their summary judgment briefing. *See Copsey v. Swearingen*, 35 F. 3d 1336, 1348 (5th Cir. 1994) (holding that district court had discretion to reconsider grant of summary judgment when party submitted evidence after court had ruled on motion) (citing *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 173-75 (5th Cir. 1990)). The court declines to consider this evidence after the court has already decided the City's motion. Plaintiffs have failed to demonstrate a satisfactory reason for failing to specify that this evidence supports their claim that motor-driven vehicles or equipment *caused* their damages.

Accordingly, except to the extent the court directs the City to respond to a portion of plaintiffs' motion for reconsideration, the motion is denied.

SO ORDERED.

November 19, 1997.

/s/ SIDNEY A. FITZWATER

Sidney A. Fitzwater
United States District Judge

[Doc #238] Entered October 15, 1997

In the United States District Court
for the Northern District of Texas
Dallas Division

ERNEST A. JANIK, JR., et al., Plaintiffs,

v.

CITY OF DALLAS, et al., Defendants

Civil Action No. 3.95-CV-2594-D

MEMORANDUM OPINION AND ORDER

Plaintiffs Ernest A. Janik, Jr., and Leah Eileen Janik, individually, and as next friends of their minor children, move for partial summary judgment. Defendant City of Dallas ("City") also moves for partial summary judgment. For the reasons that follow, the court denies plaintiffs' motion and grants in part and denies in part the City's motion.

I

Plaintiffs suffered personal injuries and property damage when sewage backed up into the house they were renting. They sue the City under the Fourteenth Amendment (Takings, Equal Protection, and Due Process Clauses); the federal Clean Water Act, 33 U.S.C. §§ 1251-1387, the Texas Constitution (Takings, Open Courts and Due Course of Law articles), the Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 101.001-101.109 (West 1997), the Texas Water Code, Tex. Water Code Ann. § 26.121 (West 1988); The Texas Solid Waste Disposal Act, Tex. Health & Safety Code Ann. §§ 361.001-361.613 (West 1992 & Supp. 1997); the federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202; the Texas Declaratory Judgment Act, Tex. Civ.

Prac. & Rem. Code Ann. §§ 37.001-37.011 (West 1997); the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992K; and various other state-law torts. The City moves for summary judgment as to all of plaintiffs' claims except their RCRA claim. Plaintiffs move for partial summary judgment on their Clean Water Act, nuisance per se, takings, and Texas Tort Claims Act claims and their prayer for declaratory relief.

II

The court first turns to the City's motion for partial summary judgment, and its contention that plaintiffs lack statutory and constitutional standing to sue under the citizen suits provision of the Clean Water Act, 33 U.S.C. § 1365.

A

Assuming *arguendo* that plaintiffs have statutory standing under the Clean Water Act through a combination of a discharge violation and other permit violations, the court turns to the City's assertion that the plaintiffs have failed to produce any evidence of constitutional standing. To establish constitutional standing, plaintiffs must show (1) actual or threatened injury, (2) fairly traceable to the City's action, and (3) that the injury will likely be redressed if they prevail in the lawsuit. *Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 360 (5th Cir. 1996) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs have the burden of persuasion in establishing standing. *Id.* at 361-62 ("Standing is an issue upon which the party invoking federal jurisdiction, the plaintiff, bears the burden of persuasion"). As the summary judgment movant who will not have the burden of proof on this issue at trial, the City need only point the court to the absence of evidence of standing. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *Slaughter v. Allstate Ins. Co.*, 803 F.2d 857, 860 (5th Cir. 1986) (stating that

movant must point out to district court absence of evidence showing genuine dispute).

The court need only address the second element because plaintiffs have failed to meet the requirement that the injury be "fairly traceable" to any City discharge violation. To establish that their injury is "fairly traceable" to the City's discharge, plaintiffs must establish that the City "has (1) discharged some pollutant in concentrations greater than allowed by its permit (2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that (3) the pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs." *Friends of the Earth*, 95 F.3d at 360-61 (internal quotations omitted). Plaintiffs have failed to adduce any evidence that they have an interest in the Trinity River, which is the relevant waterway in this case.

In general, Rule 56 obligates a party to designate the specific facts in the record that create genuine issues precluding summary judgment. "Rule 56 does not impose a duty on the district court to sift through the record in search of evidence to support a party's opposition to summary judgment." *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 463 (5th Cir. 1996) (citing *Jones v. Sheehan, Young, & Culp, P.C.*, 82 F.3d 1334, 1338 (5th Cir. 1996)); *accord Stults v. Conoco, Inc.*, 76 F.3d 651, 657 (5th Cir. 1996). The court has no obligation to consider evidence that the nonmovant does not bring forth in opposition to the summary judgment motion. *Doddy*, 101 F.3d at 463 (citing *Copsey v. Swearingen*, 36 F.3d 1336, 1347 n. 9 (5th Cir. 1994)).[1] To satisfy their burden, nonmovants are required to identify specific evidence in the

[1]In *Waheed v. H & R Block, Inc.*, 1993 WL 13319, at "3 (N.D. Tex. Jan. 9, 1993) (Fitzwater, J.), for example, this court criticized a summary judgment nonmovant who "'invite[d]' the court to review the entirety of her two-volume disposition — some 356 pages and accompanying exhibits — at its leisure,' to ascertain 'that there are genuine issues of material fact involved in this case.'"

record, and to articulate the precise manner in which that evidence supports their claims. *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir.), *cert. denied*, 513 U.S. 817 (1994) (citing *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied*, 506 U.S. 825 (1992)). When a party fails to refer to items in the record, the evidence is not properly before the court in deciding whether to grant the motion. *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915 (5th Cir.), *cert. denied*, 506 U.S. 832 (1992); *Nissho-Iwai Am. Corp. v. Kline*, 845 F.2d 1300, 1307 (5th Cir. 1998) (on rehearing) (denying rehearing after plaintiff asserted that deposition was of record when district court granted partial summary judgment, and holding that because plaintiff failed to designate, or in any way refer to, deposition as source of factual support for response to motion, deposition was never made part of competent summary judgment record before district court).

Plaintiffs have haphazardly listed points both in their motion and in their response to the City's motion. They have cited numerous declarations, pleadings, and other materials that they contend support their motion and opposition to the City's motion. They have failed not only to refer to specific pages of these documents in the context of each issue, but even to specify the documents that support their position with respect to each issue. Nowhere in their motion or response do plaintiffs identify their specific interest in the Trinity River. Plaintiffs have therefore failed to raise a genuine issue of material fact on this issue and to prove this element. The court holds that plaintiffs lack standing to assert a discharge violation under the Clear Water Act.

Plaintiffs also allege other violations of the City's National Pollutant Discharge Elimination System permit, such as a failure to report and mitigate the damage from the flooding. They do not, however, have standing to sue for these violations absent standing to bring suit for the discharge violation. *Friends of the Earth*, 95 F.3d at 362 ("an individual without standing to sue for discharge violations, *a fortiori*, lacks standing to sue for reporting viola-

tions") (citing and discussing *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1113 (4th Cir. 1988)).

Accordingly, the court grants the City's motion to dismiss plaintiffs' Clean Water Act claim.

III

The City moves for summary judgment on the Fourteenth Amendment claim for violations of the Equal Protection, Due Process, and Takings Clauses.

In their complaint, plaintiffs ask the court to recognize a cause of action directly under these provisions of the United States Constitution. It is settled, however, that plaintiffs cannot bring a civil action against the City except through the remedial device of 42 U.S.C. § 1983. *Hearth, Inc. v. Department of Pub. Welfare*, 617 F.2d 381, 382-83 (5th Cir. 1980) ("Congress has provided a means of seeking relief against state officials who violate the Constitution"); *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992) ("Plaintiff has no cause of action directly under the United States Constitution"); *Quality Refrigerated Servs., Inc. v. City of Spencer*, 908 F. Supp. 1471, 1487 n.9 (N.D. Iowa 1995) (concluding that court had no jurisdictional basis to entertain a Takings Clause claim where plaintiff had not invoked § 1983, and stating that "[t]here simply is no direct cause of action arising under the Constitution itself against municipal officials for alleged constitutional violations"). The court grants the City's motion and dismisses plaintiffs' claims brought directly under the United States Constitution.

IV

The City moves for summary judgment on plaintiffs' state-law takings claim. To constitute a taking under the Texas Constitution, flooding must be repeated and recurring. *Brazos River Auth. v. City of Graham*, 354 S.W.2d 99, 108 (Tex. 1961). Plaintiffs

have not asserted a repeated flooding of their rented home. They recognize that Texas law requires recurring flooding to constitute a taking.

Accordingly, the court dismisses plaintiffs' Takings claim under the Texas Constitution.

V

Plaintiffs allude to violations of the Texas Water Code, Tex. Water Code Ann. § 26.121 (West 1988), and the Texas Solid Waste Disposal Act, Tex. Health & Safety Code Ann. §§ 361.001-361.613 (West 1992 & Supp. 1997). To the extent plaintiffs assert separate causes of action for violations of these acts, the court dismisses the claims because plaintiffs do not have a private right of action under either statute. *See* Tex. Water Code Ann. §§ 26.121-26.124 (West 1988 & Supp. 1997) (providing for enforcement by state commission and "enforcement by others," but defining "others" as local governments, the Parks and Wildlife Department, or the Attorney General); *Garland Grain Co. v. D-C Home Owners Improve. Ass'n*, 393 S.W.2d 635, 640 (Tex. Civ. App. 1965, writ ref'd n.r.e.) (holding that "the duty of prohibiting pollution of public waters is vested exclusively in the state"); Tex. Health & Safety Code Ann. §§ 361.001-361.613 (West 1992 & Supp. 1997); *North Alamo Water Supply Corp. v. Texas Dep't of Health*, 839 S.W.2d 455, 459 (Tex. App. 1992, writ denied) ("North Alamo has not indicated how the Solid Waste Disposal Act authorizes a private citizen to bring an enforcement action against a party who appears to have violated a permit provision.").

VI

The City contends that the Open Courts provision of the Texas Constitution, Tex. Const. art. I, § 13, and the Due Course of Law

article, Tex. Const. art I, § 19, do not apply to this case. The court agrees.

Plaintiffs have cited no authority for bringing a claim directly under the Open Courts provision. In addition, this article prohibits the Legislature, not the courts, from abrogating or restricting a person's common law cause of action. *See Capellen v. Capellen*, 888 S.W.2d 539, 545 (Tex. App. 1994, writ denied) (holding that "'open courts' provision is directed at prohibiting the legislature from abrogating or unreasonably restricting a litigant's right to seek redress by way of a well-established common law cause of action.") Plaintiffs do not have a private right of action directly under the Due Course of Law article. *Mitchell v. Amarillo Hosp. Dist.*, 855 S.W.2d 857 (Tex. App. 1993, writ denied) (holding that plaintiffs could not bring a claim directly under § 19 of the Texas Constitution).

VII

The City also moves for summary judgment on the plaintiffs' negligence claim, for which plaintiffs seek to avoid sovereign immunity under the Tort Claims Act.

During construction, operation, and maintenance of its sewer system, the City has sovereign immunity for its negligence, except to the extent waived by the Tort Claims Act. *Shade v. City of Dallas*, 819 S.W.2d 578, 582 (Tex. App. 1991, no writ). In Texas, the Tort Claims Act waives immunity as provided in Tex. Civ. Prac. & Rem. Code Ann. § 101.021 (West 1997).[2] Under the

[2]Section 101.021 provides:

A governmental unit in the state is liable for:

(1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:

(A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and

statute, property damage is only recoverable against a governmental unit if the damage arises from the operation of a motor-driven vehicle or motor-driven equipment. The operation of the motor-driven vehicle or equipment must cause the property damage. *City of San Antonio v. Winkenhower*, 875 S.W.2d 388, 390 (Tex. App. 1994, no writ).

The City contends that plaintiffs cannot recover for property damage because they have not shown that motor-driven vehicles or equipment caused their loss. The court holds that plaintiffs have failed to raise a genuine issue of material fact concerning the use of motor-driven vehicles or equipment and how it caused their loss. Although plaintiffs have provided a long list referencing all summary judgment evidence filed in the case, they have failed to point the court to a specific item of evidence that creates a fact issue.[3] As the court has explained *supra* at § II(B), Rule 56 does not obligate the court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment. Plaintiffs must identify specific evidence in the record, and articulate the precise manner in which that evidence supports their claims. Therefore, the court dismisses plaintiffs' claim for property damage arising from the City's negligence.

The City also contends that by nature of its discretionary powers in maintaining a sewer system, it is immune from personal

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(B) the employee would be personally liable to the claimant according to Texas law; and

(2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

[3]Plaintiffs ask the court to consider their "Notice of Supplemental Declaration Identifying Newly Discovered Evidence," filed September 24, 1997. Even were the court to consider this submission in the context of the City's summary judgment motion, the information does not raise a fact issue concerning how the motor-driven vehicles and equipment caused plaintiffs' injuries.

injury and property damage under Tex. Civ. Prac. & Rem. Code § 101.056 (West 1997). As the summary judgment movants, the City is initially responsible for informing the district court of the basis of its motion. *Celotex*, 477 U.S. at 323. The court holds that the City has not met its summary judgment burden on this issue because it has not adequately informed the court of the basis for this part of its motion.

VIII

The City moves for summary judgment dismissing plaintiffs' prayer for relief under both the Texas Declaratory Judgment Act and the Federal Declaratory Judgment Act for plaintiffs' Clean Water Act claim, negligence claim under the Tort Claims Act, Texas Water Code claim, and Waste Disposal Act claim. The court has granted summary judgment for the City as to all of these claims except for the claim for personal injury from negligence pursuant to the Tort Claims Act. In order to entertain a prayer for declaratory relief, there must exist a justiciable case or controversy. *Ashcroft v. Mattis*, 431 U.S. 171, 172-73 (1977) ("[f]or a declaratory judgment to issue, there must be a dispute which calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts") (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 277, 242 (1937); *Barcroft v. State*, 900 S.W.2d 370, 372 (Tex. App. 1995, no writ) (discussing, in context of declaratory judgment action, necessity for justiciable controversy). Consequently, plaintiffs' prayer for declaratory relief based on those causes of action is dismissed as moot.

For other reasons, plaintiffs' prayer for declaratory relief under the Texas Declaratory Judgement Act for the remaining claim of personal injury from the City's negligence is also dismissed. Texas courts have held that declaratory judgment is not appropriate when plaintiff's cause of action for damages on the same claim is justiciable and provides an appropriate remedy. *See Tucker v.*

Graham, 878 S.W.2d 681, 683 (Tex. App. 1994, no writ) ("declaratory judgment action is not appropriate where plaintiff's cause of action is mature and enforceable in a pending suit that involves the same parties and the same issues as alleged in the declaratory judgment action"); *Southern Traffic Bureau v. Thompson*, 232 S.W.2d 742, 750-51 (Tex. Civ. App. 1950, writ ref'd n.r.e.) ("'If adequate relief, and an appropriate remedy, are presently available to the complaining party through the means of other existing forms of action or proceeding, jurisdiction for a declaratory judgment will not ordinarily be entertained.'") (citation omitted). Plaintiffs have a justiciable claim for negligence under the Tort Claims Act. Therefore, declaratory judgment is not appropriate for this claim.

As for declaratory judgment under the Federal Declaratory Judgment Act for plaintiffs' claim for personal injuries from the City's negligence, the City has not met its burden of showing that it is entitled to summary judgment on this issue.

IX

Finally, the City moves for dismissal of plaintiffs' claims for nuisance, nuisance per se, trespass, and conversion.[4] The court may not dismiss plaintiffs' complaint for failure to state a claim pursuant to Rule 12(b)(6) unless it appears beyond a doubt that plaintiffs can prove no set of facts in support of their claims that would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The court must accept as true the complaint's allegations and view them in the light most favorable to plaintiffs for purposes of deciding the motion to dismiss *Royal Bank of Can. v.*

[4]The City alternates between asking for summary judgment on these claims and contending that plaintiffs cannot state a claim on which relief can be granted. The court refers to the issues of law presented in the City's motion, which frame the issue under Fed. R. Civ. P. 12(b)(6), and decides the motion under the standards for a motion to dismiss.

FDIC, 733 F. Supp. 1091, 1094 (N.D. Tex. 1990) (Fitzwater, J.). The court is unable to say that plaintiffs can prove no set of facts entitling them to relief on the basis of their nuisance, nuisance per se, trespass, and conversion claims. Therefore, the court denies this portion of the City's motion.

X

The court next addresses plaintiffs' motion for partial summary judgement.

Plaintiffs move for summary judgment on their Clean Water Act claim, nuisance per se claim, Takings claim, Texas Tort Claims Act, and prayer for declaratory relief. Some of these claims have been eliminated by the court's granting summary judgment in favor of the City. As to those claims that remain viable, the court denies plaintiffs' motion.

Plaintiffs have failed to make cogent and comprehensible legal arguments that are supported by summary judgment evidence specifically designated in the record. Plaintiffs have instead listed allegations, declarations, and other evidence filed with the court at various times. When the party who will have the burden of proof at trial as to a particular claim or defense moves for summary judgment as to that claim or defense, it bears the burden of establishing "beyond peradventure all of the essential elements of the claim or defense." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). The summary judgment nonmovant is not obligated to adduce any summary judgment evidence until the movant has properly supported its motion. *Afco Steel, Inc. v. Tobi Eng'g, Inc.*, 893 F.2d 92, 94 (5th Cir. 1990). The nonmovant may appropriately respond to the motion simply by pointing out that the movant has failed to carry his burden. *Isquith v. Middle South*

Utils., Inc., 847 F.2d 186, 199 (5th Cir.), *cert. denied*, 488 U.S. 926 (1988). Accordingly, the court denies plaintiff's motion.[5]

* * *

[Three asterisks in original]

The court denies plaintiffs' motion and grants in part and denies in part the City's motion.

SO ORDERED.

October 14, 1997.

/s/ SIDNEY A. FITZWATER

Sidney A. Fitzwater
United States District Judge

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[5]The City has also filed motions to strike portions of plaintiffs' summary judgment evidence. The court has not relied on the contested parts of plaintiffs' evidence in deciding the City's motion because plaintiffs have failed to refer to it in context. These motions are also moot in light of the court's denial of plaintiffs' motion.

Plaintiffs object to the City's late filing of its summary judgment motion. The court granted the City leave to file its summary judgment motion on February 6, 1997. The court overrules the objection.

APPENDIX PART B

U.S. CONSTITUTION PROVISIONS

ARTICLE III

Section 2

(1) The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all cases of admiralty and maritime Jurisdiction;—to Controversies between two or more States; between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

ARTICLE VI

(2) This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

FEDERAL STATUTES

28 U.S.C.A. § 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

SELECTED CLEAN WATER ACT STATUTES

33 U.S.C. § 1251 CONGRESSIONAL DECLARATION OF GOALS AND POLICY
33 U.S.C. § 1311 EFFLUENT LIMITATIONS
33 U.S.C. § 1342 N.P.D.E.S. (POLLUTER'S PERMIT PROGRAM)
33 U.S.C. § 1365 CITIZEN SUITS

TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26 — WATER POLLUTION PREVENTION AND CONTROL
SUBCHAPTER I — RESEARCH AND RELATED PROGRAMS

§ 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter —

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

* * * * *

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

* * * * *

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be

met through the control of both point and nonpoint sources of pollution.

* * * * *

(e) Public participation in development, revision, and enforcement of any regulation, etc.

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

* * * * *

(June 30, 1948, c. 758, Title I, § 101, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 816, and amended Dec. 27, 1977, Pub.L. 95-217, §§ 5(a), 26(b), 91 Stat. 1567, 1575.)

(As amended Feb. 4, 1987, Pub.L. 100-4, Title III, § 316(b), 101 Stat. 60.)

Codification

The Federal Water Pollution Control Act, comprising this chapter, was originally enacted by Act June 30, 1948, c. 758, 62 Stat. 1155, and amended by Acts July 17, 1952, c. 927, 66 Stat. 755; July 9, 1956, c. 518, 70 Stat. 498; June 25, 1959, Pub.L. 86-70, 73 Stat. 141; July 12, 1960, Pub.L. 86-624, 74 Stat. 411; July 20, 1961, Pub.L. 87-88, 75 Stat. 204; Oct. 2, 1965, Pub.L. 89-234, 79 Stat. 903; Nov. 3, 1966, Pub.L. 89-753, 80 Stat. 1246; Apr. 3, 1970, Pub.L. 91-224, 84 Stat. 91; Dec. 31, 1970, Pub.L. 91-611, 84 Stat. 1818; July 9, 1971, Pub.L. 92-50, 85 Stat. 124; Oct. 13, 1971, Pub.L. 92-137, 85 Stat. 379; Mar. 1, 1972, Pub.L. 92-240, 86 Stat. 47, and was formerly classified first to section 466 et. seq. of this title and later to section 1151 et seq.

of this title. The Act is shown herein, however, as having been added by Pub.L. 92-500 without reference to such intervening amendments because of the extensive amendment, reorganization, and expansion of the Act's provisions by Pub.L. 92-500.

Legislative History

For legislative history and purpose of Pub.L. 92-500, see 1972 U.S.Code Cong. and Adm.News, p. 3668. See, also, Pub.L. 95-217, 1977 U.S.Code Cong. and Adm.News. p. 4326.

For legislative history and purpose of Pub.L. 100-4, see 1987 U.S.Code Cong. and Adm.News, p. 5.

SUBCHAPTER III—STANDARDS AND ENFORCEMENT

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * * * *

(2) Requirements for granting modifications

A modification under this subsection shall be granted only upon a showing by the owner or operator of a point source satisfactory to the Administrator that —

* * * * *

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow

recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment...

* * * * *

(June 30, 1948, c. 758, Title III, § 301, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 844, and amended Dec. 27, 1977, Pub.L. 95-217, §§ 42-47, 53(c), 91 Stat. 1582-1586, 1590; Dec. 29, 1981, Pub.L. 97-117, §§ 21, 22(a)-(d), 95 Stat. 1631, 1632; Jan. 8, 1983, Pub.L. 97-440, 96 Stat. 2289.)

(As amended Feb. 4, 1987, Pub.L. 100-4, Title III, §§ 301(a) to (e), 302(a) to (d), 303(a), (b)(1), (c) to (f), 304(a), 305, 306(a), (b), 307, 101 Stat. 29-37; Nov. 18, 1988, Pub.L. 100-688, Title III, § 3202(b), 102 Stat. 4154; Oct. 31, 1994, Pub.L. 103-431, § 2, 108 Stat. 4396; Dec. 21, 1995, Pub.L. 104-66, Title II, § 2021(b), 109 Stat. 727.)

Legislative History

For legislative history and purpose of Pub.L. 92-500, see 1972 U.S. Code Cong. and Adm.News, p. 3668. See, also, Pub.L. 95-217, 1977 U.S. Code Cong. and Adm.News, p. 4326; Pub.L. 97-117, 1981 U.S. Code Cong. and Adm.News, p. 2629.

For legislative history and purpose of Pub.L. 100-4, see 1987 U.S. Code Cong. and Adm.News, p. 5. See, also, Pub.L 100-688, 1988 U.S. Code Cong. and Adm.News, p. 5767; Pub.L. 104-66, 1995 U.S. Code Cong. and Adm.News, p. 674.

SUBCHAPTER IV — PERMITS AND LICENSES

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title, shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

* * * * *

(j) Public information

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

(k) Compliance with permits

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health...

* * * * *

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

(B) Municipal discharge

Permits for discharges from municipal storm sewers —

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

* * * * *

(June 30, 1948, c. 758, Title IV, § 402, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 880, and amended Dec. 27, 1977, Pub.L. 95-217, §§ 33(c), 50, 54(c)(1), 65, 66, 91 Stat. 1577, 1588, 1591, 1599, 1600.)

(As amended Feb. 4, 1987, Pub.L. 100-4, Title IV, §§ 401 to 404(a), (c), formerly (d), 405, 101 Stat. 65 to 67, 69; Oct. 31, 1992, Pub.L. 102-580, Title III, § 364, 106 Stat. 4862; Dec. 21, 1995, Pub.L. 104-66, Title II, § 2021(e)(2), 109 Stat. 727.)

Legislative History

For legislative history and purpose of Pub.L. 92-500, see 1972 U.S.Code Cong. and Adm.News, p. 3668. See, also, Pub.L. 95-217, 1977 U.S.Code Cong. and Adm.News, p. 4326.

For legislative history and purpose of Pub.L. 100-4, see 1987 U.S.Code Cong. and Adm.News, p. 5. See, also, Pub.L. 104-66, 1995 U.S.Code Cong. and Adm.News, p. 674.

SUBCHAPTER V — GENERAL PROVISIONS

§ 1365. Citizen suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf —

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced —

(1) under subsection (a)(1) of this section —

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

* * * * *

(d) Litigation costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Statutory or common law rights not restricted.

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statue or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (7) a regulation under section 1345(d) of this title.

(g) "Citizen" defined

For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

* * * * *

(June 30, 1948, c. 758, Title V, § 505, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 888.)

(As amended Feb. 4, 1987, Pub.L. 100-4, Title III, § 314(c), Title IV, § 406(d)(2), Title V, §§ 504, 505(c), 101 Stat. 49, 73, 75, 76.)

Legislative History

For legislative history and purpose of Pub.L. 92-500, see 1972 U.S.Code Cong. and Adm.News, p.3668.

For legislative history and purpose of Pub.L. 100-4, see 1987 U.S.Code Cong. and Adm.News, p.5.

SELECTED R.C.R.A. STATUTES

42 U.S.C. § 6901 CONGRESSIONAL FINDINGS
42 U.S.C. § 6903 DEFINITIONS
42 U.S.C. § 6939 DOMESTIC SEWAGE
42 U.S.C. § 6972 CITIZEN SUITS

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 82—SOLID WASTE DISPOSAL
SUBCHAPTER I—GENERAL PROVISIONS

§ 6901. Congressional findings

* * * * *

(b) Environment and health

The Congress finds with respect to the environment and health, that —

* * * * *

(2) disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment;

* * * * *

(4) open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and the land;

(5) the placement of inadequate controls on hazardous waste management will result in substantial risks to human health and the environment;

(6) if hazardous waste management is improperly performed in the first instance, corrective action is likely to be expensive, complex, and time consuming;

* * * * *

Pub.L. 89-272, Title II, § 1002, as added Pub.L. 94-580, § 2, Oct. 21, 1976, 90 Stat. 2796, and amended Pub.L. 95-609, § 7(a), Nov. 8, 1978, 92 Stat. 3081; Pub.L. 98-616, Title I, § 101(a), Nov. 8, 1984, 98 Stat. 3224.)

Revision Notes and Legislative Reports

1976 Acts. House Report No. 94-1491(Parts I and II), see 1976 U.S. Code Cong. and Adm. News, p. 6238.

1978 Acts. House Report No. 95-1171, see 1978 U.S. Code Cong. and Adm. News, p. 7569.

1984 Acts. House Report No. 98-198 and House Conference Report No. 98-1133, see 1984 U.S. Code Cong. and Adm. News, p. 5576.

Codifications

The statutory system governing the disposal of solid wastes set out in this chapter is found in Pub.L. 89-272, Title II, as amended in its entirety and completely revised by section 2 of Pub.L. 94-580, Oct. 21, 1976, 90 Stat. 2795.

SUBCHAPTER I — GENERAL PROVISIONS

§ 6903. Definitions

As used in this chapter:

* * * * *

(3) The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

* * * * *

(5) The term "hazardous waste" means solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may —

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

* * * * *

(7) The term "hazardous waste management" means the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes.

* * * * *

(15) The term "person" means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and shall include each department, agency, and instrumentality of the United States.

* * * * *

(26A) The term "sludge" means any solid, semisolid or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility or any other such waste having similar characteristics and effects.

(27) The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment

plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage. . . .

* * * * *

(29) The term "solid waste management facility" includes —

* * * * *

(C) any facility for the collection, source separation, storage, transportation, transfer, processing, treatment or disposal of solid wastes, including hazardous wastes, whether such facility is associated with facilities generating such wastes or otherwise.

* * * * *

(33) The term "storage", when used in connection with hazardous waste, means the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste.

(34) The term "treatment", when used in connection with hazardous waste, means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.

* * * * *

(40) Except as otherwise provided in this paragraph, the term "medical waste" means any solid waste which is generated in the diagnosis, treatment, or immunization of human beings or animals, in research pertaining thereto, or in the production or testing of biologicals. Such term does not include any hazardous waste identified or listed under subchapter III of this chapter or any household waste as defined in regulations under subchapter III of this chapter.

* * * * *

(Pub.L. 89-272, Title II, § 1004, as added Pub.L. 94-580, § 2, Oct. 21; 1976, 90 Stat. 2798, and amended Pub.L. 95-609, § 7(b), Nov. 8, 1978, 92 Stat. 3081; Pub.L. 96-463, § 3, Oct. 15, 1980, 94 Stat. 2055; Pub.L. 96-482, § 2, Oct. 21, 1980, 94 Stat. 2334; Pub.L. 100-582, § 3, Nov. 1, 1988, 102 Stat. 2958; Pub.L. 102-386, Title I, §§ 103, 105(b), Oct. 6, 1992, 106 Stat. 1507, 1512.)

Revision Notes and Legislative Reports

1976 Acts. House Report No. 94-1491(Parts I and II), see 1976 U.S. Code Cong. and Adm. News, p. 6238.

1978 Acts. House Report No. 95-1171, see 1978 U.S. Code Cong. and Adm. News, p. 7569.

1980 Acts. House Report No. 96-1415, see 1980 U.S. Code Cong. and Adm. News, p. 4354.

Senate Report No. 96-172 and House Conference Report No. 96-1444, see 1980 U.S. Code Cong. and Adm. News, p. 5019.

SUBCHAPTER III — HAZARDOUS WASTE MANAGEMENT

§ 6939. Domestic sewage

(a) Report

The Administrator shall, not later than 15 months after November 8, 1984, submit a report to the Congress concerning those substances identified or listed under section 6921 of this title which are not regulated under this subchapter by reason of the exclusion for mixtures of domestic sewage and other wastes that pass through a sewer system to a publicly owned treatment works. Such report shall include the types, size and number of generators which dispose of such substances in this manner, the types and quantities disposed of in this manner, and the identification of significant generators, wastes, and waste constituents not regulated under existing Federal law or regulated in a manner sufficient to protect human health and the environment.

(b) Revisions of regulations

Within eighteen months after submitting the report specified in subsection (a) of this section, the Administrator shall revise existing regulations and promulgate such additional regulations pursuant to this subchapter (or any other authority of the Administrator, including section 1317 of Title 33) as are necessary to assure that substances identified or listed under section 6921 of this title which pass through a sewer system to a publicly owned treatment works are adequately controlled to protect human health and the environment.

* * * * *

(Pub.L. 89-272, Title II, § 3018, as added Pub.L. 98-616, Title II, § 246(a), Nov. 8, 1984, 98 Stat. 3264.)

Revision Notes and Legislative Reports

1984 Acts. House Report No. 98-198 and House Conference Report No. 98-1133, see 1984 U.S. Code Cong. and Adm. News, p. 5576.

SUBCHAPTER VII — MISCELLANEOUS PROVISIONS

§ 6972. Citizen suits

(a) In general

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf —

(1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

* * * * *

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged

violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

(b) Actions prohibited

(1) No action may be commenced under subsection (a)(1)(A) of this section —

(A) prior to 60 days after the plaintiff has given notice of the violation to —

(i) the Administrator;

(ii) the State in which the alleged violation occurs; and

(iii) to any alleged violator of such permit, standard, regulation, condition, requirement, prohibition, or order,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter; or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such

permit, standard, regulation, condition, requirement, prohibition, or order.

In any action under subsection (a)(1)(A) of this section in a court of the United States, any person may intervene as a matter of right.

(2)(A) No action may be commenced under subsection (a)(1)(B) of this section prior to ninety days after the plaintiff has given notice of the endangerment to —

(i) the Administrator;

(ii) the State in which the alleged endangerment may occur;

(iii) any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in subsection (a)(1)(B) of this section,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter.

* * * * *

(e) Costs

The court, in issuing any final order in any action brought pursuant to this section or section 6976 of this title, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(f) Other rights preserved

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).

* * * * *

(Pub.L. 89-272, Title II, § 7002, as added Pub.L. 94-580, § 2, Oct. 21, 1976, 90 Stat. 2825, and amended Pub.L. 95-609, § 7(p), Nov. 8, 1978, 92 Stat. 3083; Pub.L. 98-616, Title IV, § 401, Nov. 8, 1984, 98 Stat. 3268.)

Revision Notes and Legislative Reports

1976 Acts. House Report No. 94-1491 (Parts I and II), see 1976 U.S.Code Cong. and Adm.News, p. 6238.

1978 Acts. House Report No. 95-1171, see 1978 U.S.Code Cong. and Adm.News, p. 7569.

1984 Acts. House Report No. 98-198 and House Conference Report No. 98-1133, see 1984 U.S.Code Cong. and Adm.News, p. 5576.

CODE OF FEDERAL REGULATIONS

VOLUME 40
PROTECTION OF ENVIRONMENT

Parts 87 to 135
Revised as of July 1, 1997

Containing a codification of documents of general applicability and future effect.

As of July 1, 1997.

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Table V — Toxic Pollutants and Hazardous Substances Required To Be Identified by Existing Dischargers if Expected To Be Present.

Toxic Pollutants

Asbestos

Hazardous Substances

Acetaldehyde
Allyl alcohol
Allyl chloride
Amyl acetate
Aniline
Benzonitrile
Benzyl chloride
Butyl acetate
Butylamine
Captan
Carbaryl
Carbofuran
Carbon disulfide
Chlorpyrifos

Coumaphos
Cresol
Crotonaldehyde
Cyclohexane
2,4-D (2,4-Dichlorophenoxy acetic acid)
Diazinon
Dicamba
Dichlobenil
Dichlone
2,2-Dichloropropionic acid
Dichlorvos
Diethyl amine
Dimethyl amine
Dinitrobenzene
Diquat
Disulfoton
Diuron
Epichlorohydrin
Ethion
Ethylene diamine
Ethylene dibromide
Formaldehyde
Furfural
Guthion
Isoprene
Isopropanolamine Dodecylbenzenesulfonate
Kelthane
Kepone
Malathion
Mercaptodimethur
Methoxychlor
Methyl mercaptan
Methyl methacrylate
Methyl parathion
Mevinphos

Mexacarbate
Monoethyl amine
Monomethyl amine
Naled
Napthenic acid
Nitrotoluene
Parathion
Phenolsulfanate
Phosgene
Propargite
Propylene oxide
Pyrethrins
Quinoline
Resorcinol
Strontium
Strychnine
Styrene
2,4,5-T (2,4,5-Trichlorophenoxy acetic acid)
TDE (Tetrachlorodiphenylethane)
2,4,5-TP [2-(2,4,5-Trichlorophenoxy) propanoic acid]
Trichlorofan
Triethanolamine dodecylbenzenesulfonate
Triethylamine
Trimethylamine
Uranium
Vanadium
Vinyl acetate
Xylene
Xylenol
Zirconium

EPA-ISSUED NPDES PERMIT
(for the City of Dallas)

AUTHORIZATION TO DISCHARGE UNDER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
TRINITY RIVER BASIN
PERMIT TX0047830/TX0047848
PART III
STANDARD CONDITIONS FOR NPDES PERMITS

SECTION A. GENERAL CONDITIONS

1. Introduction

In accordance with the provisions of 40 CFR Part 122.41, et. seq., this permit incorporates by reference ALL conditions and requirements applicable to NPDES Permits set forth in the Clean Water Act, as amended, (hereinafter known as the "Act") as well as ALL applicable regulations.

2. Duty to Comply

The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application.

* * * * *

8. Criminal and Civil Liability

Except as provided in permit conditions on "Bypassing" and "Upsets", nothing in this permit shall be construed to relieve the permittee from civil or criminal penalties for noncompliance. Any false or materially misleading representation or concealment of information required to be reported by the provisions of the permit, the Act, or applicable regulations, which avoids or effec-

tively defeats the regulatory purpose of the Permit may subject the Permittee to criminal enforcement pursuant to 18U.S.C. Section 1001.

9. Oil and Hazardous Substance Liability

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under Section 311 of the Act.

10. State Laws

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable State Law or regulation under authority preserved by Section 510 of the Act.

* * * * *

SECTION B. PROPER OPERATION AND MAINTENANCE

* * * * *

2. Duty to Mitigate

The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

3. Proper Operation and Maintenance

a. The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by permittee as efficiently as possible and in a manner which will minimize upsets and discharges of excessive pollutants and will achieve compliance with the conditions of this permit. Proper

operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of backup or auxiliary facilities or similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of this permit.

b. The permittee shall provide an adequate operating staff which is duly qualified to carry out operation, maintenance and testing functions required to insure compliance with the conditions of this permit.

* * * * *

5. Upset Conditions

a. Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with such technology-based permit effluent limitations if the requirements of Part III.B.5.b. are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

b. Conditions necessary for a demonstration of upset. A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

(1) An upset occurred and that the permittee can identify the cause(s) of the upset;

(2) The permitted facility was at the time being properly operated;

(3) The permittee submitted notice of the upset as required by Part III.D.7; and,

(4) The permittee complied with any remedial measures required by Part III.B.2.

c. Burden of proof. In any enforcement proceeding, the permittee seeking to establish the occurrence of an upset has the burden of proof.

6. Removed Substances

Solids, sewage sludges, filter backwash, or other pollutants removed in the course of treatment or wastewater control shall be disposed of in a manner such as to prevent any pollutant from such materials from entering navigable waters.

* * * * *

SECTION C. MONITORING AND RECORDS

1. Inspection and Entry

The permittee shall allow the Director, or an authorized representative, upon the presentation of credentials and other documents as may be required by the law to:

a. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;

b. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;

c. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices or operations regulated or required under this permit; and

d. Sample or monitor at reasonable times, for the purpose of assuring permit compliance or as otherwise authorized by the Act, any substances or parameters at any location.

* * * * *

3. Retention of Records

The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least 3 years from the date of the sample, measurement, report, or application. This period may be extended by request of the Director at any time.

* * * * *

SECTION D. REPORTING REQUIREMENTS

* * * * *

7. Twenty-Four Hour Reporting

a. The permittee shall report any noncompliance which may endanger health or the environment. Any information shall be provided orally within 24 hours from the time the permittee becomes aware of the circumstances. A written submission shall be provided within 5 days of the time the permittee becomes aware of the circumstances. The report shall contain the following information:

(1) A description of the noncompliance and its cause;

(2) The period of noncompliance including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and,

(3) Steps being taken to reduce, eliminate, and prevent recurrence of the noncomplying discharge.

b. The following shall be included as information which must be reported within 24 hours:

(1) Any unanticipated bypass which exceeds any effluent limitation in the permit;

(2) Any upset which exceeds any effluent limitation in the permit; and,

(3) Violation of a maximum daily discharge limitation for any of the pollutants listed by the Director in Part II (industrial permits only) of the permit to be reported within 24 hours.

c. The Director may waive the written report on a case-by-case basis if the oral report has been received within 24 hours.

8. Other Noncompliance

The permittee shall report all instances of noncompliance not reported under Parts III.D.4 and D.7 and Part I.B (for industrial permits only) at the time monitoring reports are submitted. The reports shall contain the information listed at Part III.D.7.

FEDERAL RULES

Rule 15(d), Federal Rules of Civil Procedure

Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Rule 56, Federal Rules of Civil Procedure

SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the

facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the fact so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

* * * * *

TEXAS CONSTITUTION PROVISIONS

No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made unless by the consent of such person . . . .

Texas Constitution, Article I, § 17.

SELECTED TEXAS TORT CLAIMS ACT STATUTES

§ 101.021 GOVERNMENTAL LIABILITY
§ 101.0215 LIABILITY OF A MUNICIPALITY
§ 101.056 DISCRETIONARY POWERS

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
CIVIL PRACTICE AND REMEDIES CODE –
TITLE 5. GOVERNMENTAL LIABILITY
CHAPTER 101. TORT CLAIMS
SUBCHAPTER B. TORT LIABILITY OF
GOVERNMENTAL UNITS

§ 101.021. Governmental Liability

A governmental unit in the state is liable for:

(1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee within his scope of employment if:

(A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and

(B) the employee would be personally liable to the claimant according to Texas law; and

(2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

Prior Laws:

Acts 1969, 61st Leg., p. 874, ch. 292, § 3.

Acts 1973, 63rd Leg., p. 77, ch. 50, § 1.

Acts 1983, 68th Leg., p. 3084, ch. 530, § 1.

Vernons' Ann.Civ.St. art. 6252-19, § 3(b).

CHAPTER 101. TORT CLAIMS
SUBCHAPTER B. TORT LIABILITY OF GOVERNMENTAL UNITS

§ 101.0215. Liability of a Municipality

(a) A municipality is liable under this chapter for damages arising from its governmental functions, which are those functions that are enjoined on a municipality by law and are given it by the state as part of the state's sovereignty, to be exercised by the municipality in the interest of the general public, including but not limited to:

* * * * *

(2) health and sanitation services;

* * * * *

(6) garbage and solid waste removal, collection, and disposal;

* * * * *

(9) sanitary and storm sewers;

* * * * *

(32) water and sewer service;

* * * * *

(b) This chapter does not apply to the liability of a municipality or damages arising from its proprietary functions, which are those functions that a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality, including but not limited to:

(1) the operation and maintenance of public utility;

(2) amusements owned and operated by the municipality; and

(3) any activity that is abnormally dangerous or ultrahazardous.

(c) The proprietary functions of a municipality do not include those governmental activities listed under Subsection (a).

Added by Acts 1987, 70th Leg., 1st C.S., ch. 2. § 3.02, eff. Sept. 2, 1987.

Amended by Acts 1997, 75th Leg., ch. 152, § 1 eff. Sept. 1, 1997.

1997 Legislation

Acts 1997, 75th Leg., ch. 152 in subsec. (a), added subd. (34).

CHAPTER 101. TORT CLAIMS
SUBCHAPTER C. EXCLUSIONS AND EXCEPTIONS

§ 101.056. Discretionary Powers

This chapter does not apply to a claim based on:

(1) the failure of a governmental unit to perform an act that the unit is not required by law to perform; or

(2) a governmental unit's decision not to perform an act or on its failure to make a decision on the performance or nonperform-

ance of an act if the law leaves the performance or nonperformance of the act to the discretion of the governmental unit.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

Prior Laws:

Acts 1969, 61st Leg., p. 874, ch. 292, § 14(7).

Vernon's Ann.Civ.St. art. 6252-19 §14(7).

APPENDIX PART C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST A. JANIK, JR., individually; and wife, **LEAH EILEEN JANIK**, individually; and ERNEST A. JANIK, JR., and wife LEAH EILEEN JANIK, as the Parents and Next Friends of their Minor Children, **GRANT JOSEPH JANIK** and **TYLER NEWMAN JANIK**;
plaintiffs,

v.

The **CITY OF DALLAS**;
defendant[1].

CIVIL ACTION
No. 3:95-CV-2594-D

[Doc #358 Filed 6-25-98]

PLAINTIFFS' NOTICE OF APPEAL

NOTICE is hereby given that all of the plaintiffs[2] hereby appeal to the United States Court of Appeal for the Fifth Circuit the final **Judgment** entered in this action on May 28, 1998, — and *also* appeal from memorandum opinions and orders ("rulings") entered in this action, specifically, the rulings in this action

[1] Plaintiffs' suit against the City of Dallas, by virtue of the final Judgment entered 5-28-1998, was **severed** from the plaintiffs' ongoing lawsuit against the other three defendants (who are AMICA MUTUAL INSURANCE COMPANY; NOBEL SERVICE CORPORATION; and IAS CLAIM SERVICES, INC.).

[2] **FRAP Form 1, in conjunction with FRAP Rule 3(c), indicates that it is permissible to identify appellants as "all plaintiffs".**

entered on October 15, 1997[3] and on November 20, 1997[4] and on April 17th/20th, 1998[5] and on May 13, 1998[6] and on May 26, 1998[7], — since, by way of said interlocutory rulings, the trial court:

(a) granted various portions of summary judgment relief in response to the City of Dallas' original and supplemental summary judgment motions filed by the City of Dallas[8];

(b) failed to grant summary judgment relief and declaratory requested by the plaintiffs against the City of Dallas[9];

(c) failed to grant the plaintiffs' motion for reconsideration[10];

(d) failed to recognize that plaintiffs 3rd Amended Complaint had alternatively pled for RCRA relief under "42 U.S.C. § 6972";

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[3] MEMORANDUM OPINION AND ORDER signed October 14, 1997 [instrument #238]; this ruling is relied on and replaced by the 4-17-1998-entered ruling [#342].

[4] ORDER signed November 19, 1997 [instrument #301].

[5] MEMORANDUM OPINION AND ORDER signed April 16, 1998 [instrument #342]; this ruling is mentioned in the Judgment entered on May 28, 1998. The face of the ruling indicates an entry date of 4-17-1998, — yet the district clerk's docket sheet indicates an entry date of 4-20-1998.

[6] MEMORANDUM OPINION AND ORDER signed May 12, 1998 [instrument #343]; this ruling is mentioned in the Judgment entered on May 28, 1998.

[7] ORDER signed 5-22-1998 [instrument #350], denying the plaintiffs' motions identified in the record as instruments #344 and #346.

[8] the City of Dallas' 1st summary judgment motion was filed 2-12-1997 [instrument #104]; the City of Dallas' 2nd motion for summary judgment was filed 12-15-1997 [instrument #314].

[9] filed 2-3-1997 [instrument #82].

[10] filed 10-24-1997 [instrument #241].

(e) failed to grant plaintiffs' motion to reconsider or vacate[11];

(f) failed to grant plaintiffs' motion to partially reinstate[12] parts of the 4-17-1998 ruling; and

(g) failed to grant plaintiffs' MOTION FOR LEAVE to File RCRA-related Supplement[13] to their 3rd Amended Complaint[14].

Respectfully submitted by:

/s/ JAMES J. S. JOHNSON

James J. Scofield Johnson, Esq.

* * * * *

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[11] filed 5-22-1998 [instrument #344].

[12] filed 5-22-1998 [instrument #346].

[13] filed 5-22-1998 [instrument #348].

[14] Said motion for leave to file a supplement was filed on May 22, 1998; — it was neither expressly granted nor denied, — however, it was denied by necessary implication via the final Judgment entered on May 28, 1998.

[N.D. Tex., Dallas Div.]
[Civil Action No. 3:95-CV-2594-D]
[JANIK, et al. v. CITY OF DALLAS, et al.]

* * * * *

[DOC #140 Filed on 3/10/97, Footnotes excluded]

DECLARATION
OF
DAVID CHARLES BRANDON, M.D.
regarding medical/health problem issues, pursuant to 28 U.S.C. § 1746,

in Support of plaintiffs' Rule 56-related filings...

1. Attached is a true and correct copy of my report issued by me on or about January 16, 1997... *My opinions as expressed in that 1-16-1997 report are still held by me as my expert opinions on those issues,* except that I have expanded upon those conclusions and opinions within the following pages of this declaration. *See also the attached medical literature abstracts showing medical research on sewage exposure-related illnesses and/or regarding research on certain pathogens sometimes found as raw sewage-borne contaminants.* For a few examples, consider the research reported at *Am. J. Ind. Med.* 25(1): 59-63 (Jan. 1994) (studying personal exposures to airborne bacteria in relation to symptoms of sewage workers, showing an association between bacilli and symptoms, such as fatigue and headaches); *Epidemiol. Infect.* 113(1):121-128 (Aug. 1994) (sewage workers shown to have 2.2 times higher incidence of hepatitis A virus infection than non-sewage workers); *Appl. Environ. Microbiol.* 62(9):3466-3469 (Sept. 1996) (study on comparative prevalence of enterohemorrhagic E. coli in raw and treated municipal sewage);

Am. J. Public Health 86(9):1228-1234 (Sept. 1986) (study identifying dose-response relationships among bathers exposed to marine waters contaminated by domestic sewage, in relation to levels of non-enteric illnesses such as respiratory illness, eye, ear, and skin ailments, with special attention to fecal coliforms, esp. fecal streptococci); *Epidemiol. Infect.* 114(2):289-295 (Apr. 1995) (studying associations of symptoms with community sewage contamination, including elevated levels of abdominal cramps, diarrhea, appetite loss, nausea, and fatigue); *Appl. Environ. Microbiol.* 62(6):2081-2085 (June 1996) (studies of protozoan parasites Giardia and Cryptosporidium species in wastewater); *Adv. Pediatr.* 43:171-207 (1996) (study of E. coli 0157:H7 as etiological agent of bloody diarrhea and hemolytic-uremic syndrome); *Curr. Opin. Pediatr.* 5(5):573-579 (Oct. 1993) (study of gastrointestinal infection in children, including newer gastrointestinal parasites that cause diarrhea): *J. Am. Med. Assn.* 269(17): 2264-2266 (5-5-1993) (E. coli 0157:H7 infection in the United States); *Int. J. Med. Microbiol. Virol. Parasitol. Infect. Dis.* 281(4):534-543 (Nov. 1994) (study of outbreak of E. coli 0157:H7-caused gastrointestinal disease and hemolytic uremic syndrome); *J. Pediatr.* 125(4):519-526 (Oct. 1994) (study of contaminated hamburger vector-caused outbreak of E. coli 0157:H7-caused gastrointestinal disease and hemolytic uremic syndrome); *J. Am. Med. Assn.* 273(13): 985-986 (4-5-1995) (study of contaminated dry-cured salami vector-caused outbreak of E. coli 0157:H7-caused gastrointestinal disease and hemolytic uremic syndrome); etc.

* * * * *

2. ***Regarding what the Janiks Got Sick With:***
Now that I have reviewed, considered, and relied upon the handwritten notes of the treating physicians who treated the

members of the Janik family (shortly after their exposure to raw sewage overflow/flooding inside their home on 10-31-1993), — I now have an expert opinion regarding what kind/kinds of symptoms/health problems that the Janiks acquired during the immediate months following 10-31-1993, — namely, **the Janik family members acquired various health problems/diseases/symptoms/illnesses/conditions,** *including the following health problems/diseases/symptoms/illnesses/conditions:* bowel dysbiosis, headaches, nausea, malaise, bronchitis, cough, viral bronchitis, streptococcal infections, stress, gastrointestinal disorganization, yeast infections, tympanic membrane inflammation, rectal bleeding, sore throat, nodal hypertrophy, in cervical chain (E.J. and Grant), tracheitis, diarrhea, vomiting, flatulence, pharyngitis. (This listing is not necessarily exhaustive.)

5. ***Regarding what Caused the Janiks to Get Sick:***
Also, after having reviewed, considered, and relied upon the handwritten notes of the treating physicians who treated the members of the Janik family shortly after their exposure to raw sewage overflow/flooding at their residence (10-31-1993), — I now have an expert opinion regarding the *causation* of the various symptoms that the Janiks acquired during the immediate months following 10-31-1993, — namely, **that the Janik family members were caused to suffer** *the above-noted various health problems/diseases/symptoms/illnesses/conditions,* **based on the following causation process/causation relationship/causation chain-of-events:** the Janiks were directly exposed to raw sewage on 10/31/1993. This exposure (which exposure was supplemented by later re-exposures, due to later contact with items contaminated by the original sewage contaminants) **caused the subsequent ailments and infections that the Janik family has suffered.** I have

identified a cause and effect relationship between the sewage exposure(s) and the initiation of various health complaints that were treated by the Janiks' family physicians immediately after the exposure and for several weeks. The symptoms the Janik family described to their treating physicians were caused by absorbing into their bodies various viral and bacterial toxins and living pathogens. As well, the physician reports lead me to conclude that the Janiks were exposed to unknown contaminants which made them feel sick.

[N.D. Tex., Dallas Div.]
[Civil Action No. 3:95-CV-2594-D]
[JANIK, et al. v. CITY OF DALLAS, et al.]

* * * * *

[Doc #318 Filed on 1/5/98;
Selected Footnotes Included]

DECLARATION
WITH EXPERT OPINIONS
OF
DAVID C. BRANDON, M.D.
relevant to
Sewage-Borne Hazardous Wastes, etc.

* * * * *

B. My Deposition Testimony Regarding "Lethal Pathogens"

On page 177, of my deposition transcript I was asked a question about the Janiks' exposure to *"lethal pathogens". I responded that the Janiks were, in my expert opinion, exposed to lethal pathogens, since I know that the specific pathogens in involved in the sewage (such as the microörganisms cultured thereafter at abnormally high CFU concentrations) can be lethal and in some cases have been lethal....*

Q You have treated and seen *people die of these* and others. When during the course of your practice have you treated such people?

A Each one individually, or just in general?

Q Well, I mean, if you have a small enough number, just tell us real quickly.

A Well, mainly, when I was in the ICU as an attending and as a fellow, we had people of these diseases.

Q Which diseases, when you say "these diseases"?

A I've had patients die of every one of these; HIV, hepatitis, parasites, viruses, Aspergillus fungus ball and TB, tuberculosis.

Q Okay. During the times you were doing your internship and your fellowship?

A Yes, and residency.

* * * * *

Q Okay. Now, is that what you're also referring to when you refer to toxic substances?

I'm talking about your initial report, Paragraph 4, when you talk about raw sewage is the most heavily concentrated source of infectious material and toxic substances, is that what you're referring to with the gases?

A Yes, and other things, chemical wastes that get into the sewer system especially from hospitals where labs in hospitals are. They use benzenes, a lot of organic chemicals for cleaning and washing microbiological things. Those things are all toxic to the body.

* * * * *

C. Causation of Human Illnesses by Raw Sewage Exposure

This lethality and pathogenicity is a medical concern that I focused on when I analyzed the historical situation (which began on 10-31-1993) that has been experienced by the Janik family members, as those issues were subjects of various portions of my deposition:

Q And what is your statement that they were inadvertently exposed to lethal pathogens based on?

A It's based on the results of the environmental specialists that cultured their house that they were in, and all of the bacteria

and fungi that came up positive in their cultures are potentially lethal.

* * * * *

D. The City of Dallas' Raw Sewage Caused the Janiks to Be Sick

At my oral deposition on 6-28-1997 I testified that it was my expert opinion that the Janik family members sicknesses that arose immediately after 10-31-1993 were caused by their exposure to raw sewage waters (including virus-transmitting, fungus-transmitting, toxin-transmitting, and/or fecal coliform-transmitting liquids, semi-solids, and/or aerosols).

Q Okay. Then you say, the Janiks were directly exposed to raw sewage on 10/31/1993. This exposure, which exposure was later supplemented by re-exposures." I read that backwards, but that's what you just told us about when this furniture came back, correct?

A Yes.

Q "Caused the subsequent ailments and infections that the Janik family has suffered. I have identified a cause-and-effect relationship between the sewage exposure and the initiation of various health complaints that were treated by the Janiks' family physicians immediately after the exposure and for several weeks.

"The symptoms the Janik family described to their treating physicians were caused by absorbing into their bodies various viral and bacterial toxins and living pathogens. As well, the physician reports lead me to conclude that the Janiks were exposed to unknown contaminants which made them feel sick."

What do you base those statements in Paragraph 5 on?

A My conversation with Mr. Janik and Mr. Johnson as well as review of the medical records that show that they were sick

when they arrived in the doctor's office, and that on several of the doctor's notes, they wrote that it was subsequent to exposure to sewage. . . .

* * * * *

I have specifically estimated the Janiks' pain and suffering experiences at about 7-to-8 on a scale of 10, — **as my Deposition indicates, at pages 322-324** *(especially at page 323).*

E. Some Substances in City of Dallas' Raw Sewage Are Hazardous

In my deposition testimony, some of which is quoted above, I referred to the fact that *untreated* sewage waters convey a mixture of potentially health-threatening substances, including but not limited to fecal coliforms, methane gas, fungi, and viruses. I also referred to the practice of hospitals putting various chemicals into the sewer lines, such as benzenes. Specifically, I testified on pages 373-375 and 393 (of my deposition) about how sewage systems can contain dangerous non-living substances: . . .

* * * * *

For examples, many of the below-listed substances are benzene derivatives *(i.e., they have one or more benzene "rings" within their essential chemical structure)*, based upon the authoritative, reliable information I have reviewed from pages of the CRC HANDBOOK OF CHEMISTRY AND PHYSICS.

* * * * *

Also, based upon copies of EPA documents provided recently to me, it appears to me that the following chemical substances have been routinely monitored for *(and have been found)* in the untreated sewage waters of the City of Dallas sanitary sewer lines.

When I previously testified that raw sewage contained and was a hazardous substances, I did so based upon my medical training,

education, and expertise, and was not then aware that the EPA had designated the specific substances listed by the EPA as "hazardous" on page 568 of 40 CFR, PART 122, APPENDIX D TABLE V...

If the EPA has designated such substances as "hazardous" (for monitoring and reporting purposes), — *which I am now assuming, based on my review of attached Exhibit #1,* — it does not appear to me to be a safe practice, ***from a public health risk standpoint,*** to permit any known risks of imminent spillages, leakages, or floodings of such substances in or at situations where there can discharge onto residential land, in an untreated conditions, especially when the exact concentrations of those listed hazardous (or otherwise potentially dangerous) substances[5] are escaping uncontrolled into unmeasured/unmonitored situations.

Chemical Substances

Acetaldehyde...	Allyl alcohol...	Cyclohexane...
Dimethyl amine...	Disulfoton...	Ethylene dibromide...
Formaldehyde...	Furfural...	Methoxychlor...
Methyl methacrylate...	Parathion...	Phosgene...
Resorcinol...	Strychnine...	Triethylamine...

F. Dallas' Sewer System, If Unfixed, Is Still Hazardous...

However, if it is established that the pressurized raw sewage overflow was caused by a cause that is still ***"unfixed"***, and I am told that is the case (based on Mr. Janik's observations of the sewer line, city sewer maps, engineering studies, etc.), then I can provide an expert public health-oriented opinion *in the form of a hypothetical scenario* that involves me *assuming* that such a

---

[5] i.e., those substances listed on **page 568 of 40 CODE OF FEDERAL REGULATIONS, PART 122, APPENDIX D, TABLE V,** entitled "TOXIC POLLUTANTS AND HAZARDOUS SUBSTANCES REQUIRED TO BE IDENTIFIED BY EXISTING DISCHARGERS IF EXPECTED TO BE PRESENT", and subtitled *"Toxic Pollutants"* (listing "asbestos") and *"Hazardous Substances"* (listing 60+ "hazardous substances", e.g., acetaldehyde, allyl alcohol, aniline, carbaryl, carbofuran, carbon disulfide, etc.), ...

precarious situation is still, like a land-mine, latently "waiting to happen again" — when the conditions necessary for a recurrence "trigger" a similar overflowing of raw, pressurized sewage.

In fact, if Mr. Janik's estimate of the amount of untreated pressurized sewage waters involved, — *i.e. about 20,000 to 40,000 gallons of untreated sewage during the multi-hour geyserings and/or floodings,* — is even close to being accurate, — **then** a recurrence of a similar pressurized sewage eruption and flooding would likely present the same kinds of public health hazards and public health risks (that the Janiks encountered) to whatever other Dallasites such may happen to in the future.

[N.D. Tex., Dallas Div.]
[Civil Action No. 3:95-CV-2594-D]
[JANIK, et al. v. CITY OF DALLAS, et al.]

* * * * *

[Doc #331 Filed 1/7/98 without Footnotes]

DECLARATION
OF
STEVEN N. McELYEA, P.E.
with Expert Opinions
pursuant to 28 U.S.C. 1746
regarding

The Causation and Future Prevention of Sewage Flooding . . .

1. **The City of Dallas' "just roots" causation theory is an unacceptable explanation for the 10-31-1993 sewage flooding.**

2. **The City of Dallas has not only mis-diagnosed the problem, it has improperly responded to that problem's need for an adequate and complete remedy, in order to prevent a similar event form occurring in the foreseeable future.**

3. **In light of #1 and #2, there continues to exist a potential public health hazard, — due to the "unfixed" conditions that facilitated the 10-31-1993 sewage flooding.**

* * * * *

4b. The City of Dallas' suggestion, whether the city suggests such expressly or impliedly, — that the "just roots"-oriented causation problem is now adequately "fixed", as is there now is no latent danger or precarious situation (potentially and

foreseeably risking another public health hazard) — "waiting" to recur to some Dallas residents (like the Janiks), — is a suggestion that ***I disagree*** with, *because, in my opinion, the underlying problem still exists.*

4c. In other words, according to the information made available to me, which information I have analyzed in conjunction with my site investigation, review of city maps *(several of which do* ***not*** *match the actual site in its current condition, as is evidenced by the pipe type, pipe slope, sag, etc., — not to mention the evidence of some kind of prior construction/repair alterations to the pipe),* — **the underlying defective situation/problem is still "unfixed" and unremedied, and thus constitutes an ongoing risk of the kinds of hazards that would likely accompany similar future malfunctioning.**

* * * * *

5. In light of the information available to me (e.g., cleaning that show "concrete" and "sand" — rather than just "roots"), about what the City of Dallas has *and has not* found or done in response to the 10-31-1993 event suffered by the Janik family, — and in the light of my prior analysis and conclusions, — I now conclude that the city's "just roots" explanation is, in effect, ***a mis-diagnosis*** of the pressurized sewage flooding causation problem.

5a. I also now conclude that removal of 10 gallons of roots to correct the 10-31-1993 event *(and to the underlying problems with the pipe's slope, sag, flow constriction, potential for and/or ongoing problems of build-up and/or leaky joints in the altered clay pipe, etc.)* — from the 10-31-1993 event until the present — **inadequate to prevent the same or similar conditions that facilitated the 10-31-1993 sewage flooding, from resulting in a future recurrence** of some kind of raw sewage discharge/flooding.

5b. **In my opinion, that this "unfixed" sewer line condition/problem continues to be a** potential public health hazard/condition, ***which is likely "waiting" to recur to Dallasites (like the Janiks) at some unknown time within the foreseeable future.***

6. ***If*** it is true that the untreated sewer line wastewaters contain hazardous substances, then the "potential public health hazard" I refer to in the above paragraph would be one in which the potential sewage flooding victims are potentially and foreseeably at risk of being exposed to and/or contaminated — by whatever such sewage-borne substances may be in such *untreated* wastewaters of the City of Dallas, that may escape/discharge at such a time.

[N.D. Tex., Dallas Div.]
[Civil Action No. 3:95-CV-2594-D]
[JANIK, et al. v. CITY OF DALLAS, et al.]

* * * * *

[Doc #348 Filed on 5/22/98]

PLAINTIFFS' MOTION FOR LEAVE TO SUPPLEMENT, and/or for Leave to Amend Their Complaint

COME NOW the plaintiffs, *pursuant to Fed.R.Civ.P. Rule 15(d), and/or per Rule 15(a) and 15(c)*, and hereby move for the following relief: that the Court's Rule 56-based ruling of 5-13-1998 be STAYED and reconsidered as to potential mootness, during a reasonable period of time wherein plaintiffs be permitted to file a Supplement to their 3rd Amended Complaint — *in order to "cure" at the trial court level whatever deficiencies that this Court had in mind when it recently ruled that plaintiffs have not alleged a claim under RCRA,*[1] — for which relief plaintiffs hereinbelow more fully describe and request as follows.

1. The Court's 5-13-1998 Order concludes that plaintiffs have not alleged a RCRA-based claim that this Court recognizes. Plaintiffs respectfully disagree, since plaintiffs literally pled (in the alternative, after providing RCRA-relevant facts), for other relief pursuant to "42 U.S.C. § 6792" (which is the RCRA citizen suit statute) — and plaintiffs request that this Court take judicial notice that **"42 U.S.C. § 6972"** ***is in fact RCRA's "citizen's suit" statute.*** However, there is a much simpler solution to this potential pleading problem: a pleading "cure" per Fed.R.Civ.P. Rule 15(d) (permitting supplemental pleas).

* * * * *

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[1] and/or, alternatively or cumulatively: that plaintiffs be given a reasonable period of time to file an amendment to their 3rd Amended Complaint, to specifically address and clarify the RCRA-related relief that plaintiffs claim against the City of Dallas.

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[Plaintiff's Exhibit "Supplement" to Plaintiffs' Motion For Leave to Supplement Doc #348 filed on 5/22/98]

PLAINTIFF'S RCRA-RELATED SUPPLEMENT
to Their
Third Amended Complaint

COME NOW the plaintiffs, *pursuant to Fed.R.Civ.P. Rule 15(d)*, and hereby submit this RCRA-related SUPPLEMENT to their previously filed Third Amended Complaint *(which Third Amended Complaint is hereby incorporated herein by reference)*, in complaint against (and requesting relief against) the City of Dallas as follows: that the Court's Rule 56-based ruling of 5-13-1998 be CLARIFIED, as more fully requested hereinbelow.

87. Plaintiffs re-allege paragraphs 1-86 of their 3rd Amended Complaint ("Complaint"), particularly including yet not limited to those Resource and Conservation Recovery Act ("RCRA")-relevant facts alleged within and by the allegations in Complaint paragraphs 10-26 (especially the RCRA-relevant facts alleged in paragraphs 20-26), — as well as those RCRA-relevant facts alleged within Complaint paragraphs 59-59f, — as well as those RCRA-relevant facts alleged within Complaint paragraphs 66-68, — as well as those RCRA-relevant facts alleged within Complaint paragraphs 75-82, — as well as those RCRA-relevant facts alleged within Complaint paragraphs 85-86, — as well as to the "Request for Relief" in said Complaint.

88. Plaintiffs hereby incorporate by reference the attached Exhibit #1, a copy of the "Plaintiffs' Objection Opposing the City

of Dallas' 12-15-1997 Summary Judgement Motion" and its respective attached Exhibits "A"[1], "B"[2], "C"[3], and "D"[4], — especially as to all legal and/or factual allegations directly or indirectly relevant to the RESOURCE AND CONSERVATION AND RECOVERY ACT OF 1976, an amendment to the SOLID WASTE DISPOSAL ACT (codified at 42 U.S.C. §§ 6901 to 6992k).

3. Plaintiffs particularly point out the propriety of a RCRA citizen suit, — on the mixed-fact-and-law issues of their being RCRA/EPA-defined "hazardous wastes" borne by sewage-influent of the City of Dallas, — is shown by the aforesaid attached Exhibit "B".

4. Plaintiffs particularly point out the propriety of a RCRA citizen suit, — on the mixed-fact-and-law issues of the City of Dallas being a RCRA-defined "person" who fits at least one of the following categories: " . . . any past or present generator, past or present transporter, past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment" — especially since the RCRA-based/EPA-identified "hazardous wastes" noted in the aforesaid Exhibit "B" were being and appear to continue to be

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[1] Janik's 1-7-1997 Affidavit Opposing the City of Dallas' 12-15-1997 Motion for Summary Judgement (the "Janik Affidavit").

[2] Declaration with Expert Opinions of David C. Brandon, M.D., relevant to Sewage-borne Hazardous Wastes, etc. . . .

[3] Declaration John T. Egbert, P.E., with Expert Opinions regarding the Causation and Future Prevention of Sewage Flooding . . .

[4] Declaration Steven N. McElyea, P.E., with Expert Opinions regarding the Causation and Future Prevention of Sewage Flooding . . .

borne by sewage-influent of the City of Dallas, as is shown by the aforesaid Exhibit "B".

5. Plaintiffs particularly point out the propriety of a RCRA citizen suit, — on the mixed-fact-and-law issues of their being RCRA/EPA-defined "imminent" and "substantial" endangerment to "human health" and/or to "the environment" — due to the un-fixed, un-remedied, and/or otherwise uncontrolled condition involving the City of Dallas' sewage-borne "hazardous wastes", — as is shown by the aforesaid attached Exhibit "B", "C", and "C", as well as by the big-picture facts alleged within attached Exhibit "A".

6. Plaintiffs particularly allege that the sewage-influent of the City of Dallas, — which is not properly conveyed, contained, and disposed into a POTW (within the sanitary sewer system of the City of Dallas), — has contained and most likely continues to contain the following "hazardous wastes": raw sewage that was and/or foreseeably can be discharged/released/disposed of apart from being processed safely into a POTW, — as well as the following chemical substances: acetaldehyde,[5] allyl alcohol,[6] aniline,[7] benzyl chloride,[8] carbaryl,[9] carbofuran,[10] carbon sulfide,[11] cresol,[12] cyclohexane,[13] dimethyl amine,[14] disulfoton,[15] ethylene dibromide,[16] formaldehyde,[17] furfural,[18] methoxychlor,[19] methyl methacrylate,[20] parathion,[21] phosgene,[22] resorcinol,[23] strychnine,[24] and triethylamine[25].

7. Moreover, the above-listed 21 chemical substances are further documented as being RCRA/EPA-identified "hazardous wastes" on pages 17 through 22 of the above-identified (and attached) Exhibit #1 (the "Plaintiffs' 1-7-1998 Objection"), especially including the hazardous waste number documentations in said Exhibit #1's footnotes 27 through 47.

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[5] [Footnotes 5 to 25 refer to pages in Dr. Brandon's Declaration]

8. Moreover, the legal reasoning for recognizing pre-POTW-discharges sewage-influent as a "hazardous waste" (as such is defined under RCRA), that is *not* excluded/exempt — under the "domestic sewage" definition — from being defined as a RCRA-identified "hazardous waste", is provided by the arguments and authorities within said attached Exhibit #1 (especially at pages 12-13 and 25). The legal reasoning for recognizing that the RCRA pre-litigation notice provisions (in 42 U.S.C. § 6972) either have been satisfied — and/or not required, due to the statutory exception involving evidences of an "imminent and substantial endangerment" threat to "human health" and/or "the environment" — is provided in said (attached) Exhibit #1 at pages 13-14 and 14-25.

9. Plaintiffs request appropriate relief to "cure" this endangerment problem, and to confirm that this endangerment problem is really "cured", — including but not limited to the following relief:

(a) a declaratory judgment declaring that the City of Dallas violated RCRA's standards on and about 10-31-1993 in connection with the raw sewage eruption and flooding near and at 5509 Melshire, in Dallas, Texas;

(b) a permanent injunction prohibiting the City of Dallas from handling, transporting, and/or disposing of any hazardous wastes, including raw sewage that fails to be completely conveyed into the city's POTW;

(c) a permanent injunction requiring the City of Dallas to succeed in identifying, mitigating, and correcting all of the problems, conditions, and materials that proximately caused (or proximately contributed to the causation of the raw sewage eruption and flooding at and near 5509 Melshire, Dallas, on and about 10-31-1993;

(d) the appointment of a special master whose duty it is to direct and confirm that the City of Dallas is complying with and is likely to continue to comply with all RCRA

standards (especially so that there is not likely to be a repeated occurrence similar to the one that the Janik family suffered on 10-31-1993 at 5509 Melshire, Dallas);

(e) citizen suit-related attorneys fees and costs as permitted via RCRA's provisions regarding such;

(f) any other appropriate relief available under or consistent with RCRA (that favors plaintiffs in relation to their claims asserted/assertable against the City of Dallas, as well as any other RCRA-related/consistent relief that may aid in otherwise prompting and motivating the City of Dallas to be held accountable regarding its RCRA duties (that serve to protect the RCRA interests of "human health" and "the environment"), to the extent that the Court determines such relief to be consistent with RCRA, appropriate to the facts and equities, and just . . .

* * * * *

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[JANIK, et al. v. CITY OF DALLAS, et al.]

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[Doc #85 Filed 2-3-97 with selected footnotes]

DECLARATION
OF
ERNEST A. JANIK, JR.
(one of the plaintiffs)
pursuant to 28 U.S.C. § 1746,
in support of plaintiffs' Rule 56-related filings

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I. INTRODUCTORY BACKGROUND

1. The above-noted lawsuit involves the personal injuries and personal property damages[7] which arose from and/or in connection with raw sewage flooding in, through, and around my

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[7] Property damages referred to herein generally include both tangible property (such as sewage-contaminated furniture) and intangible property (such as loss of use, additional living expenses, incremental costs, etc.).

Initial testing of my family's personal property surfaces demonstrated the populational presence of the following types of biohazardous microörganisms:

Escherichia coli (E. coli)	60,000 CFU/ml;
E. coli [again]	43,000 CFU/cm^2;
Spirillum volutans	44,000 CFU/cm^2;
Staphylococcus aureus	15,000 CFU/cm^2;
Bacillus subtilis	15,000 CFU/ml;

family's former home in Dallas County. That home *(the "Janik residence"), which is located at 5509 Melshire Drive, Dallas, TX 75230, was the rented residence of plaintiffs, at the time when my family's personal injuries and other damages began to occur.*

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as well as measures and/or identifications of non-fermenting Gram-negative bacteria, and Gram-positive bacilli bacteria; with specific identification of the following bacteria (and other microörganisms) being made as well:

Methanospirillum hungatei;	Enterobacter agglomeranus;
Pseudomonas stutzeri;	Acinetobacter calcorecetious lwoffi;
Flavimonas orzihabitans;	Chryscomonas luteola;
Aspergillus fumigatus;	Mucor rouxi;
Streptococcus pyogenes;	halophilic Arheobacteria;
Aspergillus niger;	Alternaria (tenuis);
Halobacterium spp.;	Penicillium spp.;
Actinomycetes israelii;	Streptococcus pneumoniae;
Nocardia spp.	Proteus [see Notice of Claim]

I am ~~informed~~ that counts in excess of 10 colony-forming-units (CFU's) indicate an abnormal exposure. My family has also been informed by an expert that one of the germs found is a germ which should only be found in hospitals, so it may be that hospital wastes (perhaps containing "toxic" and/or "hazardous" wastes) were also included in the raw sewage to which we were personally exposed.

2. The raw sewage flooding (and the initial injuries and damages caused thereby) initially arose on October 31, 1993.[8]

[8] Available information (including words spoken by City of Dallas Employees) suggests that for several days prior to October 31, 1993, the City of Dallas was "fixing the sewer line" in the alley behind 5509 Melshire Drive. For several days, a large hole was dug, and was left uncovered and not filled in. A few days before October 31, 1993 the City of Dallas came and filled in the hole, resurfaced the alley, and removed the flashing barricades.

On Sunday, October 31, 1993, in the morning, one of our neighbors called the City of Dallas to report minor sewer flooding at their house. My family was not then at home. Prior to about 2:00 p.m. the City of Dallas removed the sewer cap ("alley sewer cap") in the alley where the new construction was. The pressurized sewer shot straight into the air over the heads of those who were then there. We arrived at the house at about 2:00 p.m., and saw the following:

(a) streams of raw sewage running down the driveway into the storm sewer;

(b) raw sewage gushing out the weep-holes in of the front of the house, and draining out the weep-holes in the back of the house;

(c) raw sewage flooding the front yard;

(d) raw sewage flowing out of the garage from the exterior door and sheetrock;

(e) upon opening the door to the house, raw sewage gushed out at a depth of 2 to 3 to 4 inches, rushing like a river;

(f) a pond-like pooling of raw sewage had flooded half of the Janiks' residence;

(g) a shower drain cap was blown off and the shower area was filled with raw sewage;

(h) bath-tubs were overflowing with raw sewage; etc.

After less than an hour (of our family trying to respond to this emergency situation), a City of Dallas employee appeared and asked me if the house was flooded with sewage. The city man then suggested

3. My family's personal injuries and property damages were caused by (and continue to be caused by) the CITY OF DALLAS' operation of its municipal sanitary sewer system in a manner and condition that resulted in the flood of *pressurized raw sewerage* which *physically invaded* and flooded and colonized various portions of our home and backyard, beginning on October 31, 1993 (with colony-forming units of sewerage germs continuing to increase and to invade the Janiks' persons and/or property items thereafter). The pressurized raw sewerage then gushed out weep-holes, and blew off a bathtub drain cap, forming pools of sewerage, as well as flowing in a riverine manner in and/or alongside our home's driveway, and garage, and backyard, — eventually draining into the adjacent alley, and into the two nearby storm sewer drainage openings,[9] — such that the raw sewerage germs and germ populations which then invaded and flooded the Janik home[10] have now caused (and continue to

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that if the sewer cap (i.e., "backyard easement sewer cap" which is labeled "City of Dallas") in the backyard easement was removed, the pressurized flooding would be relieved.

After I removed the backyard easement sewer cap, as instructed, the force released was so great that it blew me backwards, with a geyser of sewage that shot straight up over my head and continued as a fountain for a while. For the next few hours the pooling sewage formed a "lake" in the backyard. Eventually, this backyard pool of sewage drained into the alley and down the alley's storm sewer drain, etc. The City of Dallas employee indicated that there was a "pumping station problem" and he recorded the flooded portions of our house.

[9] It appears that the swimming pool-like volumes of pressurized raw sewage waters poured into the nearby storm sewers. Accordingly, it appears that this overflow of domestic sewage has become a raw sewage discharge into storm sewer drains which flow, ultimately, into tributaries of the Trinity River, and thus into the Trinity River, which Trinity River is one of the navigable "waters of the United States".

[10] All of my family — my wife, our two minor sons, and me — were directly exposed to these biohazardous germs in raw sewage waters,

cause) personal injuries and property damages each of my family members.

II. SPECIFIC FACTS & ISSUES ABOUT OUR INJURIES & DAMAGES

4. Our personal injuries, including increased frequency of various illnesses caused by exposure to raw sewage and the microbial germ populations (including populations of potentially pathogenic viruses, bacteria, and fungi) contained therein or arising therefrom, — as well as recurring infections, bleeding, coughing, severe headaches, nausea, emotional distress, pain, and suffering, — as well as serious inconveniences, loss of family time, relationship-building opportunities, and familial companionship, unending disruptions to our family lives and to the activities associated with my vocational calling, property damages, and property losses, — have been suffered by my family.

5. The City of Dallas gave no meaningful assistance to our sewage-flooded situation, such as warnings, disinfection efforts, etc. Our family gave notice to the CITY OF DALLAS of their claims by jointly filing a **"NOTICE OF CLAIM AGAINST THE CITY OF DALLAS [PERSONAL INJURY — PROPERTY DAMAGE]**, on April 29, 1994, which included 228 pages of categorized attachments.[11] Our Notice of Claim specifically mentioned various aspects of my family's illnesses and personal injuries *(including: rectal bleeding, urinary tract infections,*

and via airborne contaminant aerosols, as well as via colony-forming units on furniture, etc.

[11] Moreover, after filing the above-noted Notice of Claim, the Janiks made three (3) requests for information on why the City of Dallas flatly rejected the Janiks' consolidated claims for personal injuries, etc. To date the City of Dallas has given no responsive reply to these requests for information, despite the City of Dallas' written representation that the results of the investigation would be shared with the Janiks.

fungal infections, exposure to E. coli, Proteus and [possibly] life-threatening viruses, rhinitis, bronchitis, headaches, vomiting, nausea, gastroenteritis, bleeding nose, diarrhea, severe emotional stress, congestion, pharyngitis, sinusitis, otitis, anxiety, medical doctor fees, medicine expenses, health monitoring expenses, lab costs, biohazard testing costs, etc.), and otherwise provided factual information about our personal injuries.

6. Moreover, our personal injuries, serious inconveniences, and property damages continue to date; also, the personal property damages my family has suffered continue to increase (including but not limited to moving/relocation costs, expenses in incurred in attempting to restore excessively contaminated property, which is a reasonable expense in the nature of costs of repairing damaged property). *Moreover, we still do not know all of what we were exposed to by their contact with the pressurized raw sewage*, yet my wife and I must make decisions without this critical information.

* * * * *

III. CONCURRENT CO-CAUSATION OF INDIVISIBLE HARMS

11. Based on my personal receipt and review of an official federal/city government record called an NPDES[13] permit, I have learned that the EPA-issued NPDES permit mandates specific requirements for the City of Dallas's sewer system operations. IN fact, the NPDES permits I have reviewed indicate that the City of Dallas has no authority to allow the kind of sewage flooding which has caused my family to suffer as we have, and I have further noticed that the NPDES permit conditions require the City of

[13] NPDES is an abbreviation of National Pollutant Discharge Elimination System. (See Clean Water Act, § 402 & Texas Water Code, Chapter 26.)

Dallas to mitigate emergency sewage overflows if they do occur, yet the City of Dallas did not do so when an emergency sewage overflow occurred at my family home on 10-31-1993. Thus, I have obviously inferred from those government records and my personal observations on 10-31-1993 (and during November 1993) that the personal injuries and personal property damages (from which my family has suffered and from which we continue to suffer), are due to sewage flooding contamination that was impermissibly unauthorized by the NPDES permit and was impermissibly left unmitigated by the *CITY OF DALLAS*, as is more fully documented below. . . .

* * * * *

V. FACTS & EVENTS RELEVANT TO THE CITY OF DALLAS

13. As I noted above, this lawsuit involves my family suing the CITY OF DALLAS for relief from various NPDES permit violations, including its effectively admitted failures to adequately *report and mitigate* the damages arising from its non-permitted flow and discharges of untreated sewage onto and by the premises at 5509 Melshire Drive, Dallas, TX 75230, which flooding began October 31, 1993. . . .

14. The discharging of the "raw" (i.e., wholly untreated) sewerage at 5509 Melshire (during October and November 1993) ended up becoming, in ultimate effect, a discharge of sewerage pollutants into "waters of the United States", as the following details will show. This flooding of at least one if not more "swimming pool(s)" worth of untreated sewage drained into a Dallas storm sewer drain system, which in turn drains into a freshwater tributary network that belongs to the Trinity River Basin system, which in turn ultimately flows into the Trinity River (a navigable water), which in turn ultimately flows into the Gulf of Mexico. (I have verified this myself by reviewing City of Dallas

admissions, government-produced maps (including maps produced by the City of Dallas), as well as other official government documents produced by either the Environmental Protection Agency or by the City of Dallas itself.)

* * * * *

16. The city has acted toward me (and my family) with a pattern of institutional misconduct which appears to demonstrate and display an institutional policy and/or custom of being consciously indifferent of our health needs, safety, rights, and welfare — despite our being sewage-flooding victims, *such that we have been repeatedly faced with the City of Dallas' apparent policy/position: "... no matter what you claim, you can sue us if you want, but you'll lose, we never pay, because the city has governmental immunity..."*.

* * * * *

20. In relating the above-noted items regarding the City of Dallas' Texas Water Commission-issued permit, which I have personally received and reviewed a copy of [see bates #J-007323, at item 2b], "noncompliance" is specifically defined to mean a violation of the Texas Water Commission permit. In this case the very least mitigation the City of Dallas could have taken, especially in light of its prior litigation with the Shades [see Shade v. City of Dallas, 819 S.W.2d 578 (Tex. App. — Dallas 1991, no writ, prior litigation involving City of Dallas sewage flooding, would have been to have provided my family (especially my wife and me, as the family decision-makers and guardians of our children) with a prompt and plain warning about the biohazardous character of the raw sewerage — solids, semi-solids, liquids, as well as the biohazardous airborne contaminants (e.g., sewerage aerosols).

21. Moreover, the City of Dallas further violated its own Texas Water Commission permit by failing to *"carry out such measures*

as are reasonable to prevent significant adverse impacts on human health . . ." — despite its mandate to be concerned about disposing of potentially *toxic* by-products of its sanitary sewer system-related wastewater processing activities:

. . . in accordance with all applicable state and federal . . .

[N.D. Tex., Dallas Div.]
[Civil Action No. 3:95-CV-2594-D]
[JANIK, et al. v. CITY OF DALLAS, et al.]

* * * * *

[Doc #132 Filed 2-24-97]

SUPPLEMENTAL DECLARATION
OF
ERNEST A. JANIK, JR.
regarding
the CITY OF DALLAS
pursuant to 28 U.S.C. 1746
in support of Plaintiffs' Rule 56 related filings

* * * * *

Schedule A

PLAINTIFFS SUMMARY OF KEY FACTS REGARDING CITY OF DALLAS

1. I and my family are citizens and persons having an interest which have been and may be adversely affected by the City of Dallas violations and prior ongoing problems. We currently reside at 5116 Spyglass, Dallas, Texas 75287 since about May 1995. Prior to that we lived temporarily at apartments with street addressed in Dallas, Texas. Prior to the apartments we lived at a negotiated monthly rate for 1 month at a hotel/suite during November 1993 which is also with a street address of Dallas. At the apartments we paid the City of Dallas for water/sewer services. At our present residence we have and

currently pay the city of Dallas for water and sewer services. See Tab CW. As citizen, I believe that:

(a) The city of Dallas has in the past violated the Clean Water Act in chronic episodes of violations of environmental permit based standards.

(b) That there is a reasonable likelihood that the City of Dallas will continue to violate the Clean Water Act and pollute in the future.

(c) That there is a reasonable expectation that the City of Dallas past wrongs can be repeated.

* * * * *

(f) Based on my site visits, photos taken, discussions with professional engineer it appears that the City of Dallas has not fixed, cured, mitigated and/or put into place remedial measures that clearly eliminate the cause of the past violations and ongoing problems.

* * * * *

2. The following summarizes the similarities the Janik family's raw sewage exposure and ongoing problems with that of the Shade litigation (See Tab CS):

a. In the Shades Court of Appeals Fifth District of Texas Dallas "opinion" (J9254) filed 8/19/94 (See Tab CS):

— The City of Dallas . . . it created a nuisance causing raw sewage to backup into the home of appellee Raymond Shade.

— Despite numerous attempts to clean and repair the damage, a foul odor remained.

b. — Similar to the Shades, a location where velocity of the water slows and where there is a sag, a pond of sewer

(as the case in the sewer line near the back of 5509 Melshire), there is a greater risk of buildup at that location in the pipe — an inherent design problem.

— Just because the City removes roots in the Janik discharge or grease and roots in the Shades case, "It does not indicate that that is the reason it stopped up." . . .

* * * * *

3. *History of Problems with Main*

a. This is the *third time* that this house (5509 Melshire) has incurred flooding as a result of backup rainwater/sewer coming out of the showers, tubs and commodes. Several other houses next to this house have sustained the same losses. See McKassons Declaration Notice of Claim to City of Dallas at tab CM re: 5509 Melshire.

b. "We have had *constant flooding* from *overloading of the sewer line* since that time" (lived at 5510 Williamstown since 1964). See Mr. Levines declaration at tab IN. Mr. Levine told my wife that he had to install at his cost a special relief cap in his yard to help prevent flooding. However if no one is at home to remove the cap or the City doesn't (as in the Janik's case) such mitigation is to no avail.

c. The Evans at 5503 Melshire have had 2 prior floodings of "rainwater" (through raw sewage lines). The first time Ms. Evans states she replaced the carpet. However the next year the house flooded again, the City replaced the carpet. See statements at Tab IN.

d. It was about the same time years before 10/31/93 when the City installed the Evans relief cap that the McKassons have told us that the City also installed the sewer cap in the easement which was supposed to stop future floodings. . . .

* * * * *

4. *McKassons' Notice of Claim . . .*

The McKassons narrative includes (a) "this is the *third time* that this house has incurred flooding as a result of back-up sewage coming out of the showers, tubs and commodes. Several other houses next to this house have sustained the same losses." . . .

Somewhere nearby (a) the Janiks former residence (b) the Evans house (next door neighbors to the west) and (c) the Levines house to the northwest; the storm water more than likely *directly and indirectly tie into the sanitary sewer.*

* * * * *

6. *The Levines at 5510 Williamstown*

See Mr. Levine's declaration at Tab CN.

In summary he states:

— lived at address since 1964

— *constant flooding* from overloading the sewer line due to heavy rains

— during week of October 25, 1993, *the City sewer or water department was in the alley working on the sewer* (he and his wife saw them)

— On 10/31/93 at about 12:00 to 12:45 pm he noticed flooding in his bathrooms and showers (no rain that day)

— His plumber determined it was a sewer problem

— *"to this date we cannot get a proper response from the City of Dallas"*

Mr. Levine has shown me the special relief valve he had installed to eliminate this ongoing problem. He told my wife and I that he

paid about $300 to have it installed around 11/4/93 *to prevent future floodings as result of the ongoing problem.* He didn't know that the City had installed such special devices in the McKassons and Evan's back yards/easement.

* * * *

13. *USEPA*

On 2/5/97 I had a discussion with Mr. Jimmy Graham of the USEPA regarding CSO's (combined sewer operations). I obtained Mr. Graham's name from Mr. Greg Camisha (unsure of spelling) also of the USEPA who stated there were no CSO's in Texas.

Mr. Graham explained that situations may exist where there are indirect cross connection due to ground settling, pipes misalligned and other indirect flow connections. He also stated that sometimes contractors working for a city may construct some cross connection which the city may or may not know about.

He continued to say that a city/municipality is supposed to report if there is a sewer discharge and it if flows into the waters of the USA. *If raw sewage flows over the curb then it enters the "waters of the USA" and it should be reported.* If it only backs up into a home it may or may not be legally reportable. But if it floods a house then it probably floods out of a manhole then it is considered flowing into the waters of the USA.

Mr. Graham asked in what city the flooding occurred. I told him the City of Dallas. He stated that the city of Dallas is under an order regarding an ongoing program studying the City's construction of sewer lines. Mr. Graham said I *definitely should talk to the city regarding health problems.* He stated that Cecilia Kernodle (D289) was in charge of the City of Dallas discharge reports and that he was going to ask her to call me. No call from Cecilia Kernodle as of this writing.

[N.D. Tex., Dallas Div.]
[Civil Action No. 3:95-CV-2594-D]
[JANIK, et al. v. CITY OF DALLAS, et al.]

* * * * *

[Doc #328 Filed on 11-12-97]

E.J. JANIK'S CONTROVERTING DECLARATION

pursuant to 28 U.S.C. 1746, Opposing

CITY OF DALLAS' 10-31-97 Motion to Permit Another Rule 56 Motion

* * * *

F. *City still working on sewer cap behind Melshire*

The City of Dallas records have found to be unreliable and questionable as to accuracy. Therefore, simply relying on, for instance, only 1 departments' records, such may not reveal the comprehensive and complete actual facts. For instance, the pictures that I have taken and produced of the facts of various construction, repairs and changing of the lateral caps after 10/31/93 in the alley behind my former residence is a clear example of what does not show up in the City's records and what the City does not produce. Why is the City still repairing the sewer line after 10/31/93? This *is an ongoing problem.* Therefore the factual photos, that I and/or the Plaintiffs' experts have produced appears to be contrary to the City's alleged "undisputed facts" on page 7 paragraph 8 and page 8 paragraph 12.

G. *City 1997-98 construction for repairing/replacing 50 year old pipes*

Since the City's position is that they can use their "discretion", (see City's alleged "undisputed facts" on page 8 paragraph 11) does that mean even their *discretion* not to report to the USEPA and/or other permit authorities? Does it mean that the City can use its *discretion* not to report and mitigate, for instance, problems, floodings, sewer exposures encountered in the City's "construction program in 1997-98" as a "continued investment is required to ensure Dallasites continue to enjoy the benefits of reliable water and wastewater system". See Exhibit 7 regarding how Dallas residents will be paying more to fund construction for repairing and replacing some of the oldest pipes and facilities . . ." Also stated, "For example, more than half the water and wastewater pipes in Dallas are more than 50 years old." How many other Dallas residents are going to be treated by the City the same way the Janiks were treated?

H. *Non-reporting of 10/31/93 neighborhood sewer floods*

The City has indicated that they *have not reported* the 10/31/93 sewer flooding to the USEPA (for which I have verified). This flooding affected the Melshire/Williamstown neighborhood, streets, residential homes and yards, an alley, storm sewer drains and neighborhood creek. This is contrary to any award for "complete and consistent compliance" with its NPDES permits. This contradicts the City's alleged "undisputed fact" on page 7 paragraph 7. How can any credible authority award something if the City's own documents don't recognize a neighborhood flooding affecting City of Dallas residents?

* * * *

M. *Flooded more than Janik residence*

The excessive sewage backup and flooding affected not only our "leased residence" but also affected the front yard, front, side and

back driveways, flooded down the driveway into our neighbors yard and into the street, into the storm sewer and into the creek that enters the Trinity River. This untreated sewage liquid also flooded the back yard for a few hours creating a lake of sewage which is adjacent to the alley which flowed into the storm sewer and in the above mentioned creek. (This is a clarification/ correction of the facts as authored by the City to page 1 second paragraph.)

* * * *

O. *Not Janik's sewer — Janiks weren't home*

The untreated sewage liquid that flooded our house, yards, and neighborhood was not ours. This is because we were gone since 9:00 AM that morning and didn't arrive until around 2:00 PM. Therefore this pressurized liquid sewer estimated to be between, at least 20,000 to 40,000 gallons, was from the sewer lines from residences, businesses and medical facilities that eventually are "forced flowed" through the 12" main line. This is contrary to the statement "their sewer" on page 5 paragraph 2.

* * * * *

[N.D. Tex., Dallas Div.]
[Civil Action No. 3:95-CV-2594-D]
[JANIK, et al. v. CITY OF DALLAS, et al.]

* * * * *

[Biological Hazards excerpt from Tab W with Illustrations Omitted From Janik Declaration Filed 2-3-97 Doc #85: Table of Contents listing of Tab W "City Water Utilities Safety Information"]

SAFETY

Chapter 9
Biological Hazards

Infection and Infectious Diseases

Although treatment plants and plant personnel are certainly not expected to be "pristine pure," personal cleanliness greatly reduces the risk of infections and infectious diseases. Both water and wastewater personal may be exposed to many types of biological hazards.

PATHOGENIC ORGANISMS (DISEASES) TRANSMITTED BY WATER

Bacteria

Salmonella (salmonellosis)

Shigella (bacillary dysentery)

Bacillus typhosus (typhoid fever)

Salmonella paratyphi (paratyphoid)

Vibrio cholerae (cholera)

Viruses

Enterovirus

Poliovirus

Coxsackie Virus

Echo Virus

Andenovirus

Reovirus

Infectious Hepatitis

Intestinal Parasites

Entamoeba histolytica (amoebic dysentery)

Giardia lamblia (giardiasis)

Ascaris lumbricoides (giant roundworm)

The wastewater worker has greater exposure to these hazards.

Organisms	Disease	Reservoir(s)
Enteric viruses:		
Enteroviruses (67 types)	Gastroenteritis, heart anomalies, meningitus, other	Man, possibly lower animals
Rotaviruses	Gastroenteritus	Man, domestic animals
Parvoviruses-like agents (at least 2 types)	Gastroenteritis	Man
Hepatitus A virus	Infectious hepatitis	Man, other primates
Adenoviruses (31 types)	Respiratory disease conjunctivitus, others	Man
Bacteria:		
Escherichia coli (enteropathic types)	Gastroenteritis	Man, domestic animals
Salmonella (approx. 1700 types)	Typhoid fever, Salmonellosis	Man, domestic and wild animals, and birds
Shigella (4 app.)	Shigellosis (bacillary dysentery)	Man
	Gastroenteritis	Man, domestic animals

Organisms	Disease	Reservoir(s)
Protozoa:		
Balantidium coli	Balantidiasis	Man, swine
Entamoeba histolytica	Amebiasis	Man
Giardia lamblia	Giardiasis	Man, domestic and wild animals
Helminths:		
Nematodes (roundworms)		
Ascaris lumbricoides	Ascariasis	Man, swine?
Ancylostoma duodenale	Ancylostomiasis	Man
Necator americanus	Necatoriasis	Man
Ancylostoma braziliense (cat hookworm)	Cutaneous larva migrans	Cat
Ancylostoma caninum (dog hookworm)	Cutaneous larva migrans	Dog
Enteroblus vermicularis (pinworm)	Enterobiasis	Man
Strongyloides stercoralis (threadworm)	Strongyloidiasis	Man, dog
Toxocara cati (cat roundworm)	Visceral larva migrans	Carnivores
Toxocara canis (dog roundworm)	Visceral larva migrans	Carnivores
Trichuris trichiura (whip worm)	Trichuriasis	Man
Cestodes (tapeworms)		
Taenia seginata (beef tapeworm)	Taeniasis	Man
Tanenia solium (pork tapeworm)	Taeniasis	Man
Hymenolepis nana (dwarf tapeworm)	Taeniasis	Man, rat
Echinococcus granulosus (dog tapeworm)	Unilocular echinococcosis	Dog
Echinococcus multiocularis	Alveolar hydtid disease	Dog, carnivore

Infectious microorganisms live and multiply in man, animals, anthropods, plants, and soils. Their wastes wind up in wastewater streams. Many microorganisms detected in wastewater can pro-

duce many illnesses. For example, *E. histolytica* causes amoebiasis or amoebic dysentery, an acute enteritis whose symptoms may range from mild abdominal discomfort with diarrhea to fulminating dysentery with fever, chills, and bloody and mucoid diarrhea. In severe cases death may result.

Although most studies of routine exposures at wastewater facilities reveal little if any risk of disease associated with wastewater exposure, a number of studies continue to show some evidence of the risk of infections with hepatitis A, leptospirosis, and parasites. These reports usually stem from investigations prompted by apparent outbreaks of disease among wastewater workers. The finding of increased rates of gastro-intestinal illness among inexperienced workers, point up the importance of efforts to minimize contact with wastewater and to continue to promote basic hygienic principles.

* * * * *

Immunizations.

At the present time no additional immunizations are recommended for wastewater-exposed workers above those recommended for adults. In the most recent summary of immunization recommendations two statements specifically pertaining to wastewater workers are included:

Wastewater workers, as all other adults, should be adequately vaccinated against diptheria and tetanus.

Poliovirus and typhoid vaccines and immune globulin are not routinely recommended for wastewater workers.

[N.D. Tex., Dallas Div.]
[Civil Action No. 3:95-CV-2594-D]
[JANIK, et al. v. CITY OF DALLAS, et al.]

* * * * *

[Doc #190 Filed 4/25/97]

DEFENDANT CITY OF DALLAS' FIRST AMENDED ORIGINAL ANSWER

AND

JURY DEMAND

TO

PLAINTIFFS' THIRD AMENDED COMPLAINT

* * * * *

20. Defendant denies the allegations, as stated, in paragraph 20 of Plaintiffs' Third Amended Complaint, but Defendant admits that it did not report the sewage flooding of Plaintiffs' leased home to the Environmental Protection Agency ("EPA") or the Texas Natural Resource Conservation Commission ("TNRCC"). Defendant admits it is required to report a discharge of sewage into a sanitary storm sewer of which it is aware. Defendant denies, however, that the City of Dallas is required to report the sewage flooding of Plaintiffs' leased house to the EPA or TNRCC. Defendant admits the allegations contained in footnote 26 of Plaintiffs' Third Amended Complaint, but denies that its NPDES permit, the federal Clean Water Act, and the Texas Water Code are applicable or relevant to this case. . . .

... Defendant would admit that Plaintiffs have filed this action to seek injunctive relief against the City of Dallas, as stated in the first part of sentence four of paragraph 20 of Plaintiffs' Third Amended Complaint, but Defendant denies Plaintiffs are entitled to such relief, and further denies it is required to report any discharge of untreated sewage onto Plaintiffs' premises pursuant to its NPDES permit. Defendant admits that it did not report any alleged discharge of sewage into the sanitary storm sewer near Plaintiffs' premises.

* * * * *

23. Defendant denies the allegations, as stated, in paragraph 23 of Plaintiffs' Third Amended Complaint, but admits that it received notice of Plaintiffs' claims against the City and denied compensation to them. Defendant further admits that it did not provide Plaintiffs with health information, but denies that it had any legal duty to provide such information.

C-46

No. 98-10781

In the United States Court of Appeals
for the Fifth Circuit
[JANIK, et al. v. CITY OF DALLAS, et al.]

* * * * *

Appeal from the United States District Court
for the Northern District of Texas

BRIEF OF APPELLEE CITY OF DALLAS, TEXAS
Dated 12/9/98

* * * * *

The City has the discretion to determine the manner and method by which its responds to stopped sewer complaints, unstops blockages and cleans and repairs its sewer lines, including the type of equipment to be used, if any. There is no legal requirement or standard setting forth the manner and method by which the City is to maintain and repair its sanitary sewer mains. . . . [From page 12]

Respectfully submitted,
James J. S. Johnson, Esq.
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Attorney for Petitioners (Plaintiffs)
Date: Oct. 26, A.D. 2000

Supreme Court, U.S.
FILED
NOV 25 2001
CLERK

(3)

No. 00-684

In The

Supreme Court of the United States

ERNEST A. JANIK, JR., individually, and on behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik; LEAH EILEEN JANIK, individually, and on behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik,

Petitioners,

v.

CITY OF DALLAS, TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. The United States Court of Appeals for the Fifth Circuit correctly determined, following relevant Supreme Court precedent and circuit court decisions, that Petitioners lacked standing to bring a claim under the Clean Water Act ("CWA").

2. The United States Court of Appeals for the Fifth Circuit's ruling affirming the district court's decision that Petitioners failed to state a cause of action under the Resource Conservation & Recovery Act ("RCRA") and in finding that the district court did not abuse its discretion in not allowing their alternative motion to amend Petitioners' pleadings, is not in conflict with the decisions of this Court as to the requirements for stating a claim upon which relief can be granted or as to the factors for deciding motions to amend pleadings.

3. Even if The United States Court of Appeals for the Fifth Circuit did not address Petitioners' claim that portions of their summary judgment evidence was not considered, Petitioners failed to adequately preserve the issue in the Fifth Circuit by showing how consideration of that evidence, in proper form and with proper references, would have resulted in a showing sufficient to defeat Respondent's motion for summary judgment, and such a claim does not fall within this Court's rules for determining whether a particular question justifies granting a writ of certiorari.

QUESTIONS PRESENTED – Continued

4. The issue of preemption was not addressed by the United States Court of Appeals for the Fifth Circuit or the district court because Respondent never argued that state law bestowed immunity upon it as to Petitioners' Federal claim under the CWA, which was resolved by finding that Petitioners lacked standing to bring a claim, and this Court's decisions as to preemption are therefore not relevant.

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Respondent City of Dallas, Texas ("Respondent") files this Respondent's Brief in Opposition ("Response") to this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit ("Petition"), asking the Court to deny the Petition to review the opinion issued July 6, 2000 by the United States Court of Appeals for the Fifth Circuit. In support of this request, Respondent respectfully shows the Court as follows:

STATEMENT OF JURISDICTION

The statutory basis for jurisdiction of this Court is 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below

Petitioner's statement regarding the course of proceedings and disposition in the trial court (Petition at 2) is substantially correct, as far as what is stated. For the sake of accuracy and completeness, however, Respondent provides the following regarding the proceedings as they apply to this Petition.[1]

[1] For ease of reference and because the record on appeal had not been filed in the Fifth Circuit Court of Appeals at the

Petitioners filed this lawsuit in the United States District Court for the Northern District of Texas on October 30, 1995, for personal injuries and property damage they allegedly suffered as a result of sewage backup into the house they were renting. (D.R. at 151-154.) They sued Respondent under the United States Constitution (the Takings, Equal Protection and Due Process Clauses), the Clean Water Act, 33 U.S.C. §§ 1251-1387; the Texas Constitution, Article I, §§ 13, 17, and 19 (Takings, Open Courts and Due Course of Law provisions); The Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 101.001-101.109 (West 1997); the Texas Water Code Ann. § 26.121 (West 1988); the Texas Solid Waste Disposal Act, Tex. Health & Safety Code Ann. §§ 361.011-361.613 (West 1992 & Supp. 1997); the federal Declaratory Judgment Act, 28 U.S.C. § 2201; Texas Declaratory Judgment Act, Tex. Civ. Prac. & Rem. Code Ann. § 37.004 (West 1997); and various other state laws (including common law nuisance, nuisance per se, trespass and conversion). (D.R. at 141-267.) Respondent timely filed its answer in this cause on December 29, 1995. (*See* district court's docket, at entry no. 8.)

On February 11, 1997 Respondent filed its motion for summary judgment on several bases: that Petitioners

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time Respondent's Fifth Circuit brief was due, nor was it used as a reference by the parties or the Fifth Circuit at the time of oral argument, Respondent will make record references ("Designated Record" or "D.R.") throughout this Response by referring to the documents which were Bates-stamped and attached to Defendant-Appellee's Motion To Designate Record On Appeal, filed in the Fifth Circuit Court of Appeals on or about December 3, 1998.

could not establish the existence of the essential elements of each of their claims, that they did not have standing to bring private claims pursuant to the Clean Water Act and for alleged violations of Respondent's National Pollutant Discharge Elimination System ("NPDES") permits, that their Fourteenth Amendment claims were not actionable, that they did not have a private right of action under the Texas Water Code or Texas Solid Waste Disposal Act, that Respondent had sovereign immunity under the Texas Tort Claims Act for state-law tort claims, and that Petitioners' claims were not the appropriate subject for relief under the Texas and federal Declaratory Judgment Acts. (D.R. at 1-140.)

On April 18, 1997 while Respondent's summary judgment motion was pending, Petitioners filed their Third Amended Complaint, alleging a violation of the Resource Conservation & Recovery Act ("RCRA"), 42 U.S.C. § 6972, not as a separate action "per se . . . but rather . . . as an alternative standard to aid in proving up plaintiffs' Clean Water Act-related and nuisance-related cause of action . . . " (D.R. at 215-222.) On April 25, 1997, Respondent filed its first amended answer to Petitioners' Third Amended Complaint.

After considering the motion and response, the district court issued a memorandum order on October 14, 1997, granting Respondent's motion in part and denying it in part. (D.R. 308-319.) This opinion was later vacated and substituted by the district court's memorandum opinion and order, dated April 16, 1998. (D.R. 507-519.) In its memorandum opinion and order, the district court dismissed the majority of Petitioners' claims, including

their claim under the citizen suit provisions of the Clean Water Act, 33 U.S.C. § 1365. (D.R. 507-524.)

On October 25, 1997, Petitioners filed a motion to reconsider the partial summary judgment ruling of October 14, 1997. (D.R. 329-361.) The district court granted Petitioners' motion only as to its state-law takings claim based on non-negligent nuisance and directed Respondent to file a response specifically addressing this issue. (D.R. 369-370.) On December 9, 1997 Respondent filed its response. (D.R. 372-415.)

On October 30, 1997 the district court granted Respondent's motion for leave to file a supplemental motion for summary judgment (D.R. 371), and on December 15, 1997 Respondent filed its supplemental motion for summary judgment and brief on Petitioners' remaining claims, including their putative claim for recovery pursuant to the RCRA. (D.R. 416-495.)

After considering the supplemental motion and response, the district court issued a memorandum opinion and order on May 12, 1998, granting Respondent's supplemental motion for summary judgment on Petitioners' remaining claims and dismissing Petitioners' purported RCRA claim as unpleaded. (D.R. 520-524.)

On May 22, 1998, more than two and one-half years after filing this action and after three previous amendments to their pleadings, Petitioners filed their Rule 15 motion to amend their pleadings to include a RCRA claim. The district court, however, entered final judgment on May 27, 1998, dismissing with prejudice Petitioners' entire action against Respondent. (D.R. 525.)

On June 25, 1998 Petitioners perfected their appeal to the Fifth Circuit. (D.R. 526-528.) The district court's judgment was affirmed on July 6, 2000,[2] and rehearing was denied on August 3, 2000.

B. Statement of Facts

On October 31, 1993 Respondent's Water Utilities Department received an emergency call concerning a stopped sewer main and flooded residence at 5510 Williamstown in Dallas, Texas. (D.R. 17-19, 427-430.) A crew responded and unstopped the sewer main and determined the cause of the backup and flooding to be tree root intrusion into the sewer line. (*Id.*)

Petitioners, who rented the residence at 5509 Melshire, across the alleyway from 5510 Williamstown, returned home approximately thirty minutes after the emergency call. (D.R. 152.) They found that their sewer line was also backed up and had flooded their home. (*Id.*) An employee of Respondent reported to Petitioners' home and asked whether their house was flooded with sewage. (D.R. 153.) Petitioners' lateral sewer line clean-out cap, which was located in their backyard, was removed to relieve the flooding of sewage into their home. (*Id.*) As a result of removing this cap, some of the sewage runoff from Petitioners' yard may have flowed into a nearby storm drain. The response crew dispatched

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[2] The Fifth Circuit's opinion is not a published opinion; and therefore, it has no precedential value. This fact should weigh in favor of denying the Petition because even if the Fifth Circuit's ruling is incorrect, it will not be cited as authority.

by Respondent determined that the same tree root intrusion into the sewer line was the cause of the backup and flooding at both residences. (D.R. 18, 428.) A subsequent cleaning and video inspection performed on the sewer main in question confirmed that the same tree root intrusion had been the cause of the backups and flooding at both residences. (*Id.*) This video inspection did not reveal any structural problems with the sanitary sewer main which could cause a backup in the sanitary sewer lines. (D.R. 428.)

Respondent's sanitary sewer system and storm drain system are completely separate systems and operate separately. (D.R. 19, 429.) The sanitary sewer system does not operate by motor-driven equipment, but flows by the principles of gravity. (*Id.*)

There is no sanitary sewer lift station located between the residences on Williamstown and Melshire and there is no lift station located upstream from those residences. (D.R. 20-21.) A thorough search of the records concerning reports of sewer lift stations revealed that there were no malfunctions or problems during the entire months of October and November 1993, and specifically, on October 31, 1993. (*Id.*) Even if there had been a malfunction of a sewer lift station on October 31, 1993, it was physically impossible for any such malfunction to have affected, in any way, the providing of sanitary sewer service to the Williamstown and Melshire residences, or cause any sewer stoppage, sewer backup or "pressurized-like" sewage flow into or outside of Petitioners' residence. (*Id.*)

There are only two wastewater treatment plants for Respondent – the Central Wastewater Treatment Plant and the Southside Wastewater Treatment Plant. (D.R. 22-23.) A thorough search of the records for both treatment plants revealed that there were no malfunctions or problems of any kind during the entire months of October and November 1993 and, specifically, on October 31, 1993, which would cause a sewer backup or sewage flooding. (*Id.*)

A thorough search of Respondent's Water Utilities Department trouble order/service history records from 1987 through 1996 indicated that there were no reported problems concerning any sewer stoppages, sewer backups, or sewer flooding for any of the residences on Melshire and Williamstown serviced by the sewer main in question, other than the backups and flooding that occurred at 5509 Melshire and 5510 Williamstown on October 31, 1993. (D.R. 18-19, 428-429.) More importantly, there have been no instances of sewage flowing out of anyone's home and into a storm drain, specifically in this area, and no such problems are likely to reoccur. (D.R. 25.)

There is no requirement pursuant to Respondent's NPDES permits, the Clean Water Act, or any other law, which requires Respondent to report the specific contents of the sewage which flooded Petitioners' residence to Petitioners, the Environmental Protection Agency ("EPA") or the Texas Natural Resource Conservation Commission ("TNRCC"). (D.R. 18.)

Respondent's "Bud Holcomb" map, which shows sewer drainage areas, streets by name, lots and block

numbers, sizes of sewer mains and flow directions that serve within the drainage basin, reflects that there is no hospital or any other industrial user located upstream on the sewer line in the drainage basin where 5509 Melshire is located. (D.R. 429-430.) The type of sewage that entered Petitioners' residence is domestic sewage because it originated only from residences or retail businesses. (D.R. 430.) Furthermore, Respondent's sanitary sewer system is a system which is owned by a municipality and used in the treatment of municipal sewage; therefore, it is a Publicly-Owned Treatment Works ("POTW"). (D.R. 430.)

Neither Respondent nor any of its employees modified the sewer system's flow dynamics just before the backup occurred at Petitioners' residence. (D.R. 430.) Respondent did not intentionally flood Petitioners' residence with sewage, nor did it intend to cause or take any affirmative action to cause the flooding of the Petitioners' residence. (*Id.*)

ARGUMENTS SUPPORTING DENIAL OF THE WRIT

A. The Standards for Review Have Not Been Met by Petitioners

Petitioners request this Court to review the Fifth Circuit's opinion affirming the district court's rulings granting Respondent's motion for summary judgment and supplemental motion for summary judgment. (Petition at 2.) Petitioners assert that the Court's discretionary review powers are appropriately invoked because the Fifth Circuit's opinion either ignored or conflicts with this Court's decisions, and is in conflict with other circuit

courts' decisions. (*See* Petition.) Petitioners' contentions are without merit, and the Court should deny discretionary review in this matter pursuant to Supreme Court Rule 10, which states in relevant part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
> >
> > . . .
> >
> > (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

The Court has held that the principal purpose for which the Court uses certiorari jurisdiction is to resolve conflicts among the circuit courts of appeal and state courts on the meaning of provisions of federal law. *Braxton v. U.S.*, 500 U.S. 344, 347 (1991). Petitioners' failure to satisfy this standard should necessarily result in the Court's denial of their Petition.

B. The United States Court of Appeals for the Fifth Circuit Correctly Determined, Following Relevant Supreme Court Precedent and Circuit Court Decisions, that Petitioners Lacked Standing to Bring A Claim Under the Clean Water Act ("CWA")

Petitioners contend that the Fifth Circuit incorrectly applied Article III standing requirements in conflict with this Court's opinion in *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 120 S. Ct. 693 (2000), when it determined that Petitioners lacked standing to bring a claim under the CWA. (Petition at 4-17.) Specifically, Petitioners argue that the Fifth Circuit narrowly applied "its rigid and exclusive three-part formula set forth in *Friends of the Earth v. Crown Central Petroleum Corp.*, 95 F.3d 358, 350 (5th Cir. 1996)" to deny them Article III standing because it focused on "injury to the environment" instead of "injury to the plaintiff". (Petition at 8-9.) Petitioners' contentions are wholly without merit. First, the standing test relied upon by the Fifth Circuit in this case and in *Crown Central Petroleum* was not merely the Fifth Circuit's rule, but a rule of law set forth by this Court in its opinion in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) and followed by the Court in *Laidlaw*. (*See* Fifth Circuit opinion, Appendix to Petition at

A-8, A-9 (affirming district court opinion on grounds stated in district court opinion, Appendix to Petition at A-25).) In accordance with *Lujan*, for a plaintiff to have constitutional standing, he must show: (1) that he personally has suffered some actual or threatened injury, (2) that the injury is fairly traceable to the defendant's actions, and (3) his injuries are likely to be redressed by a favorable decision. (*Id.*)

Second, the Fifth Circuit did not base its opinion on Petitioners' lack of evidence under the "injury prong" of the standing test, but rather on their failure to allege and prove their injuries were "fairly traceable" to Respondent's actions. (*See* Fifth Circuit opinion, Appendix to Petition at A-8, A-9 (affirming district court opinion on grounds stated in district court opinion, Appendix to Petition at A-25, 26).) This Court's recent opinion in *Laidlaw* addresses the "injury in fact" prong of its standing test set forth in *Lujan*, not the "fairly traceable" prong which was the basis of the Fifth Circuit's opinion in this case in determining that Petitioners lacked standing. *See Laidlaw*, 120 S. Ct. at 704-705.

The Fifth Circuit affirmed the trial court's finding that Petitioners failed to meet the requirement that their alleged injuries be "fairly traceable" to any discharge violation by Respondent and correctly held that Petitioners lacked constitutional standing to bring a citizen suit under the CWA. (*See* Fifth Circuit opinion, Appendix to Petition at A-8, A-9 (affirming district court opinion on grounds stated in district court opinion).) To determine whether in a citizen suit under the CWA an injury is "fairly traceable" to a defendant's discharges, the plaintiff must demonstrate that a defendant has:

> (1) discharged some pollutant in concentrations greater than allowed by its permit;
>
> (2) **into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant** and that
>
> (3) the discharge of this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.

(Emphasis added.) *Crown Central Petroleum Corp.*, 95 F.3d at 360-61 (citing *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 72 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991)).

Specifically, the district court found, and the Fifth Circuit upheld, that Petitioners failed to meet the second prong of the three-part "fairly traceable" test: that a discharge occurred into a waterway in which the Petitioners had an interest that was or may be adversely affected. (*See* Fifth Circuit opinion, Appendix to Petition at A-8, A-9 (affirming district court opinion on grounds stated in district court opinion, Appendix to Petition at A-26, (citing *Crown Central Petroleum Corp.*, 95 F.3d at 360-61)).) The Fifth Circuit found that Petitioners failed to adduce any evidence to show that they had an interest in the Trinity River, which was the relevant waterway in this case. Thus, the court found that Petitioners failed to raise a genuine issue of material fact on this element of their claim. Consequently, the court held Petitioners lacked standing to assert a violation under the CWA.

Petitioners argue, however, that their allegations of injury caused by an NPDES permit violation is sufficient to grant them standing to sue under the CWA. (Petition,

at 14-15.) In support of their claim, Petitioners argue that their injury is "directly related to at least one of the twin concerns of the Clean Water Act and RCRA: *'human health'* and *'the environment'*) [sic]." (*Id.* at 14.)

The purpose of the CWA is the protection of the nation's waters. 33 U.S.C. § 1251(a). Specifically, the provision that Petitioners wish to enforce prohibits the unauthorized discharge of any pollutant into navigable waters from any point source. 33 U.S.C. §§ 1311, 1342(a), 1362(7), 1362(12). Petitioners presented no evidence, however, that their alleged "human health" injuries were caused by a discharge of a pollutant into a waterway, the Trinity River, in which they had an interest. In fact, Petitioners' evidence showed that their alleged injuries were personal and completely unrelated to the Trinity River. Their evidence showed that their alleged injuries occurred, if at all, when the sewage flowed into their home and onto their persons and property, not when it later ran off their property and possibly flowed into a nearby storm drain.

The Fifth Circuit did not misapply the rule of law applicable to Article III standing under the CWA and has not decided this issue in a way that conflicts with this Court's decisions in *Lujan* or *Laidlaw*. Thus, Petitioners have failed to meet the standard for review on this issue.

C. The United States Court of Appeals for the Fifth Circuit's Ruling Affirming the District Court's Decision That Petitioners Failed to State a Cause of Action Under the Resource Conservation & Recovery Act ("RCRA") and Finding That the District Court Did Not Abuse its Discretion in Not Allowing Petitioners' Alternative Motion To Amend Their Pleadings, is Not in Conflict With the Decisions of This Court As to the Requirements For Stating a Claim Upon Which Relief Can Be Granted or As to the Factors For Deciding Motions to Amend Pleadings

Petitioners contend that the Fifth Circuit's opinion affirming the district court's determination that Petitioners failed to state a claim under RCRA is in conflict with this Court's decision in *Conley v. Gibson*, 355 U.S. 41, 47 (1957). (Petition at 17-21.) Petitioners' contentions are without merit. There is no conflict because this Court's decision in *Conley* is not relevant to a determination of Petitioners' failure to state a claim under RCRA. In their third amended complaint, Petitioners asserted that they were not pleading RCRA as a separate cause of action, but were intending to utilize the RCRA

> to aid in proving up plaintiffs' Clean Water Act-related and nuisance-related causes of action (inter alia), by showing one or more statutory standard violations – so that the Clean Water Act and/or RCRA statutory violations "convert" the plaintiffs' *common law nuisance* claims into . . . *nuisance per se* claims."

(D.R. 221.) Therefore, the district court correctly ruled that Petitioners failed to allege a separate RCRA cause of

action, and the Fifth Circuit was correct in affirming the district court's decision.

Petitioners also complain that the Fifth Circuit improperly found that the district court did not abuse its discretion in denying their motion for leave to amend their pleadings a fourth time to add a RCRA cause of action, which Petitioners incorrectly claim is in conflict with this Court's decision in *Foman v. Davis*, 371 U.S. 178 (1962). (Petition at 18.) The Fifth Circuit's opinion, however, does not conflict with this Court's decision in *Foman* which recognizes that the district court has discretion in determining whether to grant a party leave to amend his pleadings. *See Foman*, 371 U.S. at 182.

The district court's ruling denying Petitioners the opportunity to amend their pleadings is reviewed by the circuit court for an abuse of discretion standard. *Moody v. FMC Corp.*, 995 F.2d 63, 65 (5th Cir. 1993). Fed. R. Civ. P. 15 provides that leave or permission to amend a pleading "shall be freely given when justice so requires." The trial court, however, has broad discretion in determining whether to grant a party leave to amend his pleadings. *Foman*, 371 U.S. at 182; *Moody v. FMC Corp.*, 995 F.2d at 65. In making this decision the court may consider (1) undue prejudice to the opposing party, (2) whether the movant unduly delayed the request, (3) whether it was offered in good faith, and (4) the futility of the amendment. *See Foman v. Davis*, 371 U.S. at 192; *Moody*, 994 F.2d at 66.

Leave to amend after a final summary judgment is allowed only in limited circumstances. Vol. 3, James W. Moore et al., Moore's Federal Practice, § 15.12[3], (3d ed. 1998) at 22. The value of a summary judgment motion is

lost if parties are allowed to test one theory at a time by obtaining consecutive leaves to amend. *Id.; see also Freeman v. Continental Gin Co.*, 381 F.2d 459, 469-470 (5th Cir. 1967) (plaintiff had fair opportunity, but failed to present adequate claim earlier in proceeding). A party should have an opportunity to establish a case; however, courts should also consider that litigation should have a timely conclusion. Moore's Federal Practice, § 15.12[3] at 23; *see also Union Planters Nat'l Leasing, Inc. v. Woods*, 687 F.2d 117, 121 (5th Cir. 1982) (court did not abuse discretion in denying leave to amend when plaintiff attempted to amend for second time after summary judgment granted).

In circumstances where a summary judgment motion is pending, one of the factors a court may consider in determining whether to grant leave to amend or supplement is the futility of the proposed additional claims. Moore's Federal Practice, § 15.12[3] at 23; *see also Foman*, 371 U.S. at 182.

The district court did not abuse its discretion by effectively denying Petitioners' motion to amend their complaint a fourth time or file a "RCRA-related" supplement to their Third Amended Complaint. Petitioners judicially admitted in their Third Amended Complaint that they were not alleging a separate RCRA cause of action. (D.R. 221.) Moreover, they did not file their Rule 15 motion until ten (10) days after the district court ruled on Respondent's supplemental motion for summary judgment, and such ruling effectively dismissed all of their claims against Respondent. (D.R. 520-524.)

At the time Petitioners filed their Rule 15 motion, this case had been pending for two and one-half years and Petitioners had amended their complaint on three prior occasions. Thus, Petitioners had a fair opportunity to present their claim under the RCRA statute and failed to do so. Furthermore, legal authority supports that no private cause of action for damages due to personal injury is expressly created by RCRA, and none is impliedly created. *Polcha v. AT & T Naussau Metals Corp.*, 837 F.Supp. 94 (M.D.Pa. 1993); *see also Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996). Therefore, Petitioners' proposed RCRA claim was futile. Given the circumstances of this case, the Fifth Circuit's holding that the district court did not abuse its discretion when it denied Petitioners the opportunity to amend their pleadings and allow Petitioners "a fifth bite at the apple" to plead a futile claim does not conflict with the decisions of this Court in *Conley* or *Foman*.

D. Even if The United States Court of Appeals for the Fifth Circuit Did Not Address Petitioners' Claim That Portions of Their Summary Judgment Evidence Was Not Considered, Petitioners Failed to Adequately Preserve the Issue in the Fifth Circuit By Showing How Consideration of That Evidence, in Proper Form and With Proper References, Would Have Resulted in a Showing Sufficient to Defeat Respondent's Motion For Summary Judgment, and Such a Claim Does Not Fall Within This Court's Rules for Determining Whether a Particular Question Justifies Granting a Writ of Certiorari

Petitioners allege that the Fifth Circuit's implicit affirmance of the district court's decision not to sift

through the record in search of evidence to support their opposition to summary judgment is in conflict with this Court's opinion in *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). (Petition at 22-23.) Pursuant to Fed. R. Civ. P. 56(c), summary judgment is appropriate in any kind of action

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c); *Celotex Corp.*, 477 U.S. at 322. The plain language of Rule 56(c) mandates the entry of a summary judgment against a party "who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. Once the moving party establishes his entitlement to summary judgment, the burden shifts, and the non-moving party must come forward with specific facts showing that there is a genuine issue for trial and may not rest upon the mere allegations or denials of his pleadings. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

To withstand a motion for summary judgment, the non-movant's response, by affidavits or as otherwise provided in Rule 56(e), must set forth specific facts creating genuine issues precluding summary judgment. *Celotex Corp.*, 477 U.S. at 322-323. The court of appeals' review of the record is plenary. *International Shortstop, Inc. v. Rally's,*

939 F.2d 1257, 1263 (5th Cir. 1991), *cert. denied*, 502 U.S. 1059 (1992). A court of appeals reviews a grant of summary judgment *de novo* by applying the same standard as the court below was required to apply. *See King v. Chide*, 974 F.2d 653, 655 (5th Cir. 1992).

It was within the court's discretion, however, to consider evidence that Petitioners failed to point out to the court in their summary judgment briefing. *Copsey v. Swearingen*, 36 F.3d 1336, 1348 (5th Cir. 1994) (holding that district court had discretion to reconsider grant of summary judgment when party submitted evidence after court had ruled on motion) (citing *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 173-75 (5th Cir. 1990)). The court's duty under Rule 56 with respect to its review of the evidence was aptly stated by the district court in its Memorandum Opinion and Order entered April 17, 1998: "Rule 56 does not impose a duty on the district court [or the court of appeals] to sift through the record in search of evidence to support a party's opposition to summary judgment." (*See district court opinion, Appendix to Petition at A-26* (citing *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 463 (5th Cir. 1996) (citing *Jones v. Sheehan, Young, & Culp, P.C.*, 82 F.3d 1334, 1338 (5th Cir. 1996)).) Neither the district court nor the court of appeals has the obligation to consider evidence that the nonmovant does not bring forth in opposition to the summary judgment motion. *Doddy*, 101 F.3d at 463 (citing *Copsey*, 36 F.3d at 1347 n. 9 (5th Cir. 1994)). To satisfy their burden, nonmovants are required to identify specific evidence in the record, and to articulate the precise manner in which that evidence supports their claims. *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir.), *cert. denied*, 513 U.S. 871 (1994)

(citing *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied*, 506 U.S. 825 (1992)).

The Fifth Circuit correctly applied the summary judgment standard set forth in *Celotex* with respect to the elements of Petitioners' claims. Neither the district court nor the Fifth Circuit had any duty pursuant to the holding in *Celotex* or Rule 56 to sift through the record in search of evidence to support Petitioners' opposition to summary judgment. Petitioners had the duty not only to appropriately identify specific evidence in the record, but to sufficiently demonstrate to the court how consideration of that evidence supported their claims to defeat summary judgment. By haphazardly listing points in their response to Respondent's motion, in their motion to reconsider and in their Fifth Circuit appellate brief, and by referring to previously filed documents not attached to their response, without showing the court how the evidence supported their claims, Petitioners failed to adduce competent summary judgment evidence to meet their burden and permit a reasonable trier of fact to find in their favor. Therefore, the district court did not abuse its discretion by not digging through the hundreds of pages of documents haphazardly listed by Petitioners, and the Fifth Circuit's opinion implicitly affirming the district court does not misapply the rule of law set forth in *Celotex*. Moreover, none of the circuit court decisions cited above or relied upon by the Fifth Circuit or the district court conflicts with this Court's opinion in *Celotex*.

E. The Issue of Preemption Was Not Addressed By the Fifth Circuit Court of Appeals or the District Court because Respondent Never Argued That State Law Bestowed Immunity Upon it as to Petitioners' Federal Claim Under the CWA, Which Was Resolved By Finding That Petitioners Lacked Standing to Bring a Claim, and this Court's Decisions as to Preemption are Therefore Not Relevant

Petitioners contend that the Fifth Circuit failed to consider the application of federal preemption under Article VI's Supremacy Clause, in conflict with this Court's holding in *Sanitary District of Chicago v. U.S.*, 266 U.S. 405 (1924), when the Fifth Circuit affirmed the district court's ruling granting summary judgment in favor of Respondent. (Petition at 24-27.) Specifically, Petitioners argue that by not discussing the issue of federal preemption, the Fifth Circuit "negated the NPDES-rooted strict liability bases for the Janiks' claims under both Texas state statutory law (esp. The "TTCA") and Texas state Constitution (Texas' non-negligent "nuisance"/"damaging remedy"). (*Id.* at 24-25.) Apparently, Petitioners are contending that if the Fifth Circuit had considered the issue of preemption, then Petitioners could have proven state-law tort and takings claims simply by showing a violation of Respondent's NPDES permit. Petitioners' arguments are without any basis in law or fact and do not meet the standards for review by this Court.

Respondent has never alleged, as a basis for dismissal of Petitioners' federal claims, that it did not have to comply with its NPDES permit or that it was entitled to dismissal of Petitioners' Clean Water Act claim because

of governmental immunity under state law. Thus, preemption was never an issue or basis for the district court's grant of summary judgment in favor of Respondent and the Fifth Circuit's affirmance of that ruling, and any decisions by this Court on the issue of preemption are irrelevant to any consideration for certiorari review by this Court.

Petitioners have failed to cite to any authority in support of their argument that proof of an alleged violation of Respondent's NPDES permit establishes causes of action under state tort-law and state constitutional takings law. They have also failed to cite to any authority to support their contentions or demonstrate why the district court and the Fifth Circuit should not have separately analyzed each element of their causes of action in accordance with the laws applicable to each and the evidence, if any, provided in Petitioners' responses to the summary judgment motions.

CONCLUSION

None of the questions Petitioners present is of such precedential value to warrant review by this Court. Furthermore, there is no conflict among the circuits regarding any of the questions presented and there is no conflict with any relevant decisions of this Court. This case does not present any issue of federal law that needs to be settled by this Court. The Fifth Circuit and district court sufficiently reviewed the facts and applied correct legal standards in reaching their conclusions. For the reasons

stated herein, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 00-684

In The

Supreme Court of the United States

ERNEST A. JANIK, JR., individually, on behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik; LEAH EILEEN JANIK, individually, on behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik,

Petitioners,

v.

CITY OF DALLAS, TEXAS, an incorporated municipality,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF

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FACT ISSUES

The City's Brief in Opposition seriously misstates material facts that were genuinely disputed at the summary judgment phase. The City generally admits the facts provided by Petitioners ("Janiks"), yet adds many more – many gerrymandered to mislead the reader. For example, with misleading sophistry the City boldly tells this Court (on its p. 7) that "there were no malfunctions or problems of any kind" that fit the Janiks' time-framed fact-pleading, yet City's own dilatorily produced monitoring reports (eventually acquired near the end of discovery) admit to a pumping failure that caused "massive build-up", the same-day that the surge basin pumps failed, causing a "runoff overload into the stormwater system", producing a City-worker-admitted "violation of permit" (the CLEAN WATER ACT/NPDES permit). This dilatorily-produced employee-admitted NPDES permit violation (caused by City pumps malfunctioning) in a **10/31/93** entry, quoted in **Cert. Petition @ p. 25**, on the very day that the Janiks' home, backyard, front and side yards, driveway, and alley storm sewer drains were flooded with thousands of gallons of City's untreated sewage waters. (*See* 5th Circuit Reply Brief, pp. 6-9.) In violation of its NPDES permit, City did not report this unpermitted discharge to the EPA; likewise, City did not report other sewage flooding problems in Dallas that appear to have been NPDES permit violative.

Moreover, City implies (p. 6) that the videotape revealed no structural defects in the sewage pipe. But, environmental engineers McElyea and Egbert disputed this "fact" at the summary judgment level. City asserts (p. 6) "roots" as the cause of City sewage wastewater

1993 flooding. But, not so – engineering experts' declarations (at the summary judgment level) disputed this. The City's untreated sewage wastewater poured into the Trinity River's tributary network, despite many eye-witness-based proofs thereof. The City says its sewage-water conveyance system uses gravity, so it is "physically impossible" for its sewer system to produce "pressurized" flooding of untreated sewage-waters (p. 6). The Janiks dispute this, based on Rule 56 declarations by eye-witnesses and engineering experts. City boldly asserts that City never had sewage wastewater overflow malfunctions like that described in the Janiks' complaint and Rule 56 declarations, – yet this is refuted by Janik proofs filed to oppose summary judgment. On all of those "fact" issues, see generally the trial court cites in Janiks' 5th Circuit Reply Brief at pp. 3-14, since City's misstatements of "fact" in its Brief to this Court mostly track similar "fact" misstatements in the Fifth Circuit. See also **Doc #131** (designating Rule 56 evidence) and Janiks' trial court objections and briefs citing such material-fact-dispute evidence, e.g., **Doc #242** (pp. 2-3, 5, 7-9, 12-16, 18, 23) and **Doc #326** (pp. 5-6, 8, 9-10, 15-25).

ARGUMENT

A. CERTIORARI STANDARDS ARE MET.

Certiorari standards are met herein, due to conflicts in the circuits, and also due to conflicts with this Court's own precedents. Despite the conclusory arguments of the City, Petitioners have documented conflicts among the

circuit courts of appeals. (See Petition for Writ of Certiorari, @ pp. 4-8 (citing cases in the 3rd, 4th, and 8th Circuits that clash with the 5th Circuit's "bright line rule" in *Friends of the Earth v. Crown Central Petroleum Corp.*, 95 F.3d 358, 360-361 (5th Cir. 1996) ("*Crown Central*"). Moreover, there exists a "split" in the circuits as to the proper standard for Rule 15(d) rulings, which can be – and is, in the Janiks' case, – case-dispositive. *See* Cert. Petition @ pp. 18-19, citing *Quarantino v. Tiffany & Co.*, 71 F.3d 58, 65-66 (2nd Cir. 1995) and a 9th Circuit ruling on Rule 15(d) standards. See also Cert. Petition @ pp. 18-19 (re abuse).

B. THE JANIKS HAVE ARTICLE III STANDING.

The Fifth Circuit's dismissal below, on Article III standing grounds, evaded conformity with this Court's doctrine in *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, 120 S.Ct. 693, 707-708 (2000) ("*Laidlaw*"), despite the panel's being informed of its deviation from *Laidlaw*. Before oral argument the Janiks became aware of a new U.S. Supreme Court ruling on Article III standing, as applied to a Clean Water Act citizen suit context, *Laidlaw*, 120 S.Ct. 693, 704, 707-708. (See Letter Brief of 5-1-2000, filed with 5th Circuit per FRAP Rule 28(j) and its related local rule.) Moreover, the *Laidlaw* precedent was emphasized as justifying a rehearing by the Fifth Circuit panel, as Petition Point #1 on pages 2-6 of the Janiks' Petition for Panel Rehearing (7-19-2000), – but the panel denied *Laidlaw*'s authority, in effect, *sub silentio*.

Laidlaw stands as a very needed and very recent clarification of Article III's standing doctrine, – distinguishing the "injury to the plaintiff" as the critical standing injury, – as opposed to "injury to the environment". (See *Laidlaw*, 120 S.Ct. at 704.) Herein the City's once-admitted violation of its Clean Water Act-mandated, EPA-issued) NPDES permit was (on 10-31-1993) the cause of personal sicknesses and of sewage-water-contaminated property losses suffered by the Janiks. So, the *Laidlaw* standing elements – (1) actual and/or imminent "injury in fact"; (2) showing that defendant's alleged conduct is "fairly traceable" as a causative agent of plaintiff's injuries;[1] and (3) redressability; – are all present in the Janiks' case. So, it is only because the Fifth Circuit has **expanded** this three-part test, **by adding to it a fourth criterion, applicable only to Clean Water Act citizen suits**, – namely, a "river interest" test. See *Friends of the Earth v. Crown Central Petroleum Corp.*, 95 F.3d 358, 360-361 (5th Cir. 1996) (*"Crown Central"*) (mandating "river interest") test as the legalistic test of "traceability" for Clean Water Act citizen suit cases), *followed by the trial court below in* Order of 4-16-1998 (**Doc #342**, @ pp. 2-5). But there is no such constitutional "river interest" test inherent in Article III. It is neither expressed nor implied in Article III's

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[1] **See generally the causation evidence provided by the Janiks' experts.** Rule 56 declarations addressing causation/traceability are shown in Cert. Petition's Appendix @ pp. C-4 through C-16, in conjunction with biohazardous data @ pp. B-23 through B-25, the City's NPDES permit shown @ pp. B-26 through B-31, biocontamination data shown @ pp. C-23 through C-28, plus @ p. C-39 (*the Janiks were not the cause!*), and City's own safety data @ pp. C-40 through C-43.

plain language. There is no historical basis for saying it was intended by the Framers. In this case, both the trial judge and the panel relied on the "river interest" test of *Crown Central* to deny the Janiks' suit – and they both did so on constitutional (not statutory) grounds! Now, whether the Janiks satisfy statutory standing norms is a very different question from whether Article III's norm is met. (In this case, the Janiks easily satisfied the standing norms of both, since Congress chose to open the federal court house door, for Clean Water Act citizen suits, as far or about as far as Article III permits.) Worse, the Fifth Circuit continues to apply *Crown Central's* "river interest" bar, even after being advised of *Laidlaw's* ruling. Thus, the Fifth Circuit's *Crown Central* "river interest" test **continues to roadblock some injured citizens proving "traceability"** because the "river interest" test partially negates categories of injuries-in-fact from being deemed "failry traceable" to Clean Water Act violations. The result is that intangible injuries (such as aesthetic "river enjoyment" injuries and the like) are deemed "fairly traceable" to NPDES permit violations, but tangible injuries such as the Janiks' physical illnesses and their property losses are not. *Crown Central's* "river interest" can be (and is now) used to treat injured-in-fact plaintiffs as non-stakeholders, – as if by applying common law *jus tertii* doctrine in the name of Article III. But, as in classic cases of "combined" private nuisance/public nuisance actions,[2] the Janiks are genuine stakeholders still living at risk. As expert engineer McElyea's declaration indicates,

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[2] See case law cited in Cert. Petition @ pp. 14-15.

the ultimate problem is still unfixed (Appendix @ C-14 through C-16).

So, the problem remains – for all served by Dallas Water Utilities, and to some extent also for all residing in Fifth Circuit states, despite *Laidlaw's* gate-keeping standards. Why? The Fifth Circuit now recognizes only "injury to the environment" and no ***"injury to human health"*** – even though the Clean Water Act was intended to promote serious care for both "the environment" and "human health", with congressionally favored enforceability by private attorneys general.[3]

C. RULE 15 RELIEF WAS UNJUSTLY DENIED.

The Fifth Circuit deviated from Rule 15's discretion limits, as such limits are denoted in *Foman v. Davis*, 371 U.S. 178, 182, 192 (1962), by refusing Janiks leave to supplement their RCRA-based claim (via a "more definite statement") in a pre-trial context, even though the Janiks' 3rd Amended Complaint had already satisfied the "notice pleading" norms of *Conley v. Gibson*, 355 U.S. 41, 47

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[3] **See Cert. Petition's Appendix @ p. B-6** (§1311(a)(2)(c) says "such modifications [*of effluent limitations*] will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an **unacceptable risk to human health or the environment"** [*emphasis added*]); **p. B-8** (§1342(k)'s concern that NPDES permit complaince norms are overridden by §1317's standard applicable for "a toxic pollutant **injurious to human health . . . "** [*emphasis added*]); **B-12** (§1365(g) defines "citizen" suitor as **"a person or persons having an interest which is or may be adversely affected"** – *notice no mention of "river interest" limitation*).

(1957). The City misinforms this honorable Court by suggesting that the Janiks sought Rule 15 relief to "amend" their 3rd Amended Complaint. Rather, the Janiks sought – in light of the trial court's about-face on the RCRA claim – to "**CLARIFY**" its RCRA claim by supplementing the Janik pleadings, to "make a more definite statement" of the RCRA citizen's suit. The RCRA suit was pled as an alternative theory to the Clean Water Act suit. The RCRA-based count also asserted facts and legal issues inextricably intertwined with the Janiks' nuisance per se count, i.e., a RCRA violation was a strict liability basis for the nuisance being recognized, legally, as nuisance per se. This Court already has before it the Janiks' proposed "PLAINTIFFS' RCRA-RELATED SUPPLEMENT TO THEIR THIRD AMENDED COMPLAINT" – see Cert. Petition's Appendix @ p. C-18 through p. C-22 (originally filed as an exhibit 5-22-1998). The Janiks were not asking for a "fifth bite at the apple" (City, p. 17). Rather, the Janiks were seeking to clarify a RCRA-based claim for relief that was already well-pleaded in their 3rd Amended Complaint (*Accord, See* Cert. Petition's Appendix @ page C-18, cross-referencing prior complaint allegations, and @ Appendix page C-20, ¶6, noting 21 hazardous substances involved in City RCRA violations). In Janiks' Reply Brief in the 5th Circuit (of 12-24-1998), Page 3's footnote #1 noted:

> The city deceptively and unjustly **withheld these documents** showing 21+ RCRA substances in untreated city sewage wastewater, – yet the Janiks discovered this [,] via use of FOIA requests to the U.S. ENVIRONMENTAL PROTECTION AGENCY's Clean Water Act/NPDES records.

Moreover, the Janiks further complained of this discovery abuse in their Petition herein (on 10-26-2000, @ pages 21-22), which included this report of City document withholding:

> In this case, the reason for the plaintiffs' delay in pleading the names of the 21 "hazardous substances" (improperly "disposed" by the city) was that the city did not properly produce the monitoring data in discovery, despite defendant's knowledge that the citizen suit focused on defendant's discharges of pollutants into a tributary network of navigable river. *See* **Doc #348**.

This discovery abuse unjustly tainted the summary judgment ruling that is now used to thwart the Janiks' Rule 15(d) motion. This Court should notice how the Fifth Circuit's approach to Rule 56(e) clashes with the logic and result, but not with the facts, of another NPDES permit ruling, *Patterson Farm, Inc. v. City of Britton, S.D.*, 22 F. Supp.2d 1085, 1093 (D.S.D. 1998) (city failed to produce NPDES records in discovery, so any summary judgment was unjust; city's duties to comply with record keeping requirements were not exonerated at the summary judgment level). Thus, Rule 15 supplementation of the Janik's 3rd Amended Complaint was just, to prevent a case-dispositive miscarriage of justice.

D. RULE 56(e) PROOF WAS UNJUSTLY IGNORED BY A METHOD CONTRADICTORY OF CELOTEX, AND ERRORS ON THIS POINT WERE PRESERVED.

The Janiks' Rule 56(e) evidence was ignored – even though it was adequate, timely, and sufficiently "designated" for summary judgment purposes that the Fifth Circuit erred in not reversing the final summary judgment (*which incorporated some interlocutory summary judgment rulings*), because the material errors within the final summary judgment, as well as all rulings incorporated in it, were reversible errors that were each preserved at the trial court and at the appellate levels. (*See generally* Cert. Petition @ 22-27 and its **Appendix, pp. C-1 through C-39,** esp. pp. C-1 through C-3.)

E. FEDERAL PREEMPTION ERRORS JUSTIFY RELIEF.

Federal preemption issues – inextricably intertwined with the case-dispositive summary judgment rulings below – were raised below and such errors (i.e., errors based on federal preemption issues) were properly preserved. The City's Brief in Opposition, @ p. 21, links the trial court's dismissal of the Janiks' nuisance per se claims with a federal preemption problem. **City is very close to being accurate here.** The Janiks' nuisance per se claims were dismissed by the trial court, by summary judgment, without any meaningful consideration that a Clean Water Act/NPDES permit violation (or a RCRA violation) can serve as the "wrongful act or omission"

element in a codified or uncodified state tort law regarding nuisance. (Codified and uncodified nuisance torts were alleged by the Janiks.) It perpetrates a mockery of the Supremacy Clause – as is happening in this case – when that state law is construed **at the summary judgment phase** as discriminating between a "wrongful act or omission" defined by state law versus violations of federal environmental law, with only federal laws being deemed outside of the state statute's definition of "wrongful act or omission". The federal preemption problem was raised in the trial court and appellate levels. See, e.g., Janiks' 5th Circuit Appellants' Brief @ pp. 16, 21, including cases cited on p. 16; Doc #327 @ pp. 8-11 (federal law preempts state tort law), shown @ Tab S of Record Excerpts; Doc #345 @ 2 (federal law preempts state tort law), @ Tab T of Record Excerpts.

CONCLUSION

Writ of certiorari should issue herein.

Respectfully submitted,

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